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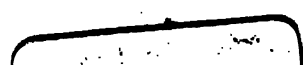


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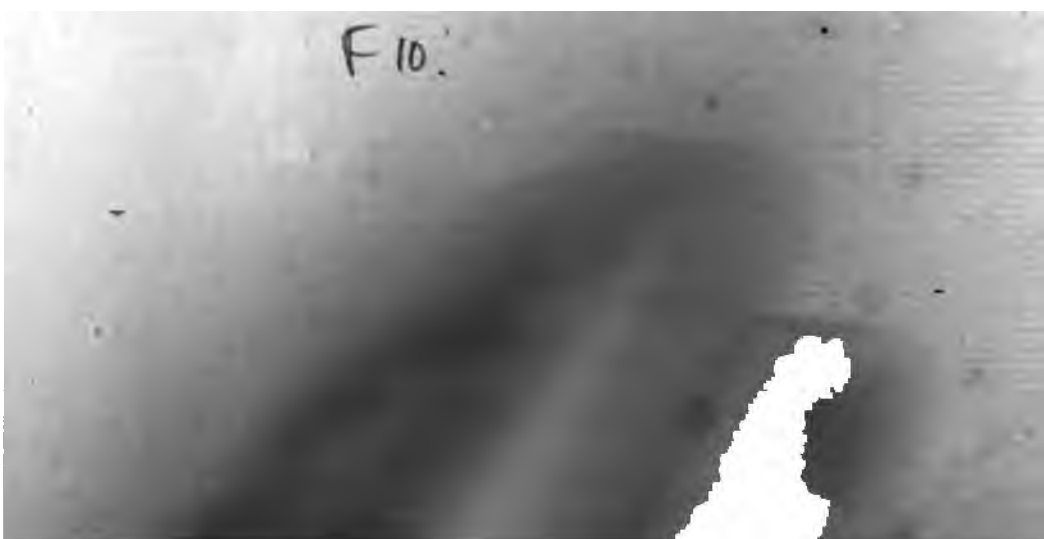




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DECISIONS

OF THE

COURT OF SESSION,

From November 1792 to July 1796.

COLLECTED BY

ROBERT DAVIDSON and DAVID DOUGLAS, Esqrs,
ADVOCATES.

By Appointment of the FACULTY of ADVOCATES.

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DECISIONS

OF THE

COURT OF SESSION.

N^o I.

November 14. 1792.

WILLIAM KEITH,

AGAINST

CHARLES GRANT, RICHARD MOLESWORTH, and others.

CONDUCTIO INDEBITI—takes place where a party obtains a preference in a ranking to which he is not entitled, although he has got no more than payment of his debt.

JUS SUPERVENIENS AUCTORI ACCRESCIT SUCCESSORI.—In heritable rights requiring seisin, a supervening right arising to the heir of the author does not accresce to the successor.

SIR ALEXANDER GRANT of Dalvey, purchased the barony of Clava, and certain lands near the borough of Nairn, from James Rose. Sir Alexander took infeftment in the lands of Clava, but his right to the Nairn lands remained personal at his death.

In 1771, he granted an heritable bond for L. 10,000 over his whole purchase, to Archibald Grant of Pittencrieff, by whom it was disposed in trust to Colquhoun Grant, writer to the Signet.

Sir Alexander having died much in debt, his brother Sir Ludovick entered heir to him *cum beneficio inventarii*; and in 1783, he disposed the whole of the said estate to Mr Keith, accountant, in trust for his brother's creditors.

The trustee, in 1786, sold the barony of Clava to Charles Gordon, at the price of L. 6800.

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In 1787, he sold the Nairn lands for L. 5000, to David Davidson, who, with the approbation of Mr Keith, and in consequence of minutes of the creditors, paid the price to Colquhoun Grant, in part of the above heritable bond.

Mr Gordon, in 1788, again sold for L. 5400 the barony of Clava, except the lands of Fleeness, to Mr Davidson, by whom L. 5000 of the price were paid to Colquhoun Grant, to further account of the same bond, and interest due upon it. This payment was also authorised by Mr Keith.

Soon after these transactions, Mr Keith having for the first time discovered, that Sir Alexander Grant had never been infeft in the Nairn lands, and that therefore the infeftment on the heritable bond, as *quoad* them flowing *a non habente*, could only affect the barony of Clava, brought an action, concluding, that Messrs Davidson and Gordon should be decerned to pay to him the price stipulated for their respective purchases, or if the Court should be of opinion, that the payments made to Colquhoun Grant were sufficiently authorised, that his representatives should be compelled to repeat all they had received, or at least the price of the Nairn lands.

Messrs Gordon and Davidson had by this time brought an action against Mr Keith, and all concerned, the object of which was, to have it declared, that the payments made to Mr Grant should *pro tanto* discharge them of the price of their purchases, and that Mr Keith, on receiving the balance, should be ordained to grant them proper titles.

In these actions, which were conjoined, appearance was made for Charles Grant, the general disponee of Colquhoun Grant, and by Richard Moleworth, as acting for the representatives of Grant of Pittencrieff, who

Pleaded: 1st, The payment of the price of Clava is liable to no objection. And with respect to the price of the Nairn lands, however defective as to them the infeftment on the heritable bond may be, yet the payment having been authorised by Mr Keith, it cannot now be recalled. Sir Alexander Grant's heirs are at least personally bound for the whole L. 10,000, and interest; and as Colquhoun Grant only received L. 10,000 in all, neither his heirs nor the heirs of Archibald Grant can be subjected to any claim of repetition. The *condictio indebiti* does not lie where a person only gets payment of what is truly owing to him; Stair, b. 1. tit. 7. § 9.; Forbes, 12th June 1713, Creditors of Muirhead against Hamilton.

But, *2dly*, Even allowing that Archibald Grant's seisin in the Nairn lands may have been originally invalid, the defect was removed by the infeftment in these lands obtained by Sir Ludovick, the heir of Sir Alexander, whereby in the eye of law he became *eadem persona cum defuncto*. For the maxim *jus superveniens auctori accrescit successori* applies not only where the *auctor* himself acquires the supervening right, but also where it is acquired by a person liable in absolute warrandice of the deed; Dirleton's Doubts, *voce Jus superveniens* and Stewart's Answers; Bank. b. 3. tit. 2. § 16. and 17.; Stair, b. 3. tit. 2. § 2.; Ersk. b. 2. tit. 7. § 4.; 15th February

1665,

1665, Boyd against Tenants, 1st December 1676, Lindsay against Grierfon.

Answered for Mr Keith: 1st, The brocard *Repetitio nulla est ab eo qui suum recepit* is misunderstood. It relates merely to the case of a person voluntarily interposing to pay the debt of another, where, although he should have done so from mistaken motives, the civil law gives him no claim of repetition, if the money was due by the true debtor. But where a person pays the debt of another, upon the erroneous supposition that he lies under an obligation to that purpose, the competency of the *condictio indebiti* was never disputed; *Voet, l. 12. tit. 6. § 9.*; Fac. Coll. 5th August 1778, Carrick against Carfe.

2^d, As Sir Alexander Grant never was infeft in the Nairn lands, there was no feudal right in him which could accresce *successori*. It is therefore impossible his heir can be considered as *eadem persona* with him as to that property, so as to make the right now in him accresce to the heritable bond. Sir Ludovick in fact does not represent Sir Alexander in these lands. He is successor in them, not to his brother, but to James Rose. He is a singular, not an universal successor. Sir Alexander, as to the real right of these lands, was in effect a stranger, and continued till his death a mere creditor to Rose for the property.

Although it may be true negatively, that where a person is *not* bound in absolute warrandice *jus superveniens non accrescit*, it will not hold positively, that in all cases where the person *is* bound in absolute warrandice, the *jus superveniens* does accresce. Two sorts of rights may here be distinguished. Personal rights, which pass by a mere dispositive act, and real rights constituted by infeftment. With respect to the first, where the *jus supervenit* to any person bound in warrandice, it may accresce, because the will of the party is all that is requisite in order to convey. But this cannot hold in landed property, where certain solemnities are necessary to accomplish the transfer, such as seisin given by the author to the successor. Where indeed a person who is not *in titulo* at the time gives infeftment to another, and is himself thereafter vested in the feudal right, the *jus superveniens* does accresce. All the necessary solemnities here concur, although there has been a little irregularity in point of time. But when the infeftment flows from a person who at no future period acquires the feudal right, there is an essential defect in point of solemnity, which never can be supplied. All the authorities quoted on the other side apply to the accretion of heritable rights, where seisin is not necessary, such as the casualties of non-entry and liferent escheat.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: The *jus superveniens* cannot accresce in the present case. If an author after giving infeftment is himself vested in the feudal right, his title becomes complete both in form and in substance, and this new acquisition of right is communicated to all his former deeds. But a seisin obtained *a non habente*

is altogether inept, and cannot be cured by any supervening right in his heir. In personal rights, the law holds an obligation to convey, and a conveyance to be the same; and therefore every person liable in absolute warrandice is bound to grant the conveyance. But in heritage, although an heir, whose ancestor conveyed, having only a personal right, is liable in warrandice, and is obliged to give an infeftment, still that infeftment cannot proceed on the precept granted by the ancestor, who never acquired any right which entitled him to grant that warrant. The circumstance of Sir Ludovick having entered heir *cum beneficio*, does not in the least affect the case.

The rule, *Nulla repetitio*, &c. applies only where the debt was due *jure naturali*. Here the obligation on the trustee to pay to Colquhoun Grant the price of the Nairn lands, was altogether *civilis*, and contrary to his duty to the other creditors. Mr Keith had no title *qua* trustee to apply the funds in any other manner than as the law directs.

The interlocutor of the Court was as follows: "Find, That
 " Archibald Grant of Pittencrieff's heritable security was only
 " effectual as to the barony of Clava, but not as to the Nairn
 " lands and fishings; and therefore, that his representatives, in
 " so far as they have received payment of more than the pur-
 " chase-money of said barony, must repeat the same to the tru-
 " stee for the creditors of the common debtor; assilzie Messrs
 " Davidson and Gordon from the action at the instance of the
 " trustee, in so far as payments were made to Mr Colquhoun Grant
 " of the prices of their respective purchases; and upon payment
 " of the balance thereof; find, That Mr Keith is bound to grant
 " a disposition of the lands of Clava to Mr Davidson, and a dis-
 " position to Mr Gordon of the lands of Fleeness, in terms of
 " the articles and conditions of sale."

A reclaiming petition for Molefworth, and another for William Keith, were refused, without answers, on the 4th December 1792.

Lord Reporter, <i>Hailes</i> .	For Mr Keith, <i>Maconochie, M. Ross</i> .
For Charles Grant, <i>R. Craigie</i> .	For Messrs Davidson and Gordon, <i>Rolland, et alii</i> .
For Molefworth, <i>Archibald Campbell junior</i> .	Clerk, <i>Sinclair</i> .

N^o II.

November 15. 1792.

JANET and JOHANNA SEMPILLS,

A G A I N S T

HUGH Lord SEMPILL.

LEGACY.—IMPLIED CONDITION.—*A legacy payable at the majority of the legatee lapses by his death before that period.—This found to hold even where the executors of the testator were empowered to pay it sooner, if they should think fit.*

HUGH DUNLOP conveyed to Hugh now Lord Sempill, his heirs and substitutes, the lands of Bishoptoun and others, by a settlement, burdening him and the lands conveyed with payment of L. 1000 to George Sempill his second, and L. 500 to Patrick his third brother, &c. ; “and these at and against the next legal term after “their attaining to their respective ages of 21 years complete.”

George and Patrick survived the testator, but died in minority.

Janet and Johanna Sempills, two of their nearest of kin, brought an action against Lord Sempill, concluding for payment of two fourths of the sums above mentioned, and

Pleaded : That legacies vest *a morte testatoris*, is a general presumption of law, which there is nothing in the present case to overturn. The legacies are not made payable, if the legatees arrive at the age of 21, nor are there any other words employed which shew the testator's intention that they should be conditional. They are simply and unconditionally constituted as burdens on the heir ; and the reference to the age of the legatees which is annexed to the term of payment, and in a posterior clause of the sentence, can only have the effect *morandæ solutionis*. The testator thus separated the *constitution* of the obligation, from the *time* at which the heir should be obliged to perform it ; two circumstances quite independent of each other, and which he may have had good reasons for distinguishing, l. 213. *De verb. sign.* Had he, without making this distinction, merely said, “I leave to George “and Patrick Sempills at and against the next term after their “arriving at the age of 21 years, to the former a thousand, to the “latter five hundred pounds,” he would then have shewn it to be his intention that the legacies should vest and be exigible at the same time.

The maxim of the Roman law, *Dies incertus pro conditione habetur*, applies only when it is uncertain, if the day will ever arrive, *e. g.* the marriage of the legatee. But there is no such uncertainty in the present case. If the day on which the legatees would in fact have reached the age of majority had been specified as the term

8; DECISIONS OF THE N° II.

The Court "affoizied the defender."

A reclaiming petition was followed, with answers; but the Lords "adhered *."

Lord Reporter, *Monboddo*,
Alt. *Wight*.

A&C. *Dean of Faculty, John Burnett*,
Clark, *Hume*.

D. D.

N° III.

November 15. 1792.

WALTER SMITON,

AGAINST

PATRICK MILLAR, and others.

CAUTIONER.—*Solidum et pro rata.*—*A Cautioner in a bond of Corroboration found only entitled to a proportional relief from the Cautioners in the original bond.*

ARCHIBALD MILLAR having obtained a credit with the British Linen Company for L. 800, a bond was granted by him, Patrick Millar, John Walker, and other two obligants, whereby they became bound, jointly and severally, to repay to the Bank whatever sums should be drawn out by Archibald Millar on that credit.

John Walker died. And the Bank having desired another cautioner in his place, a bond of corroboration was granted by the principal debtor and Walter Smiton.

Archibald Millar died bankrupt, and nearly L. 700 in debt to the Bank on this credit.

Walter Smiton upon this pursued the cautioners in the original bond for a total relief: None of them appeared but Patrick Millar, who, on the other hand, contended, that Smiton must bear an equal share of the loss with them, and

Pleaded: Mr Smiton joined in the bond of corroboration, solely in order to obtain a further indulgence to his friend the common debtor.

Where a person who has granted an obligation with cautioners, renews the same with different cautioners, without referring to the former

* The second judgment of the Court upon this last point was pronounced on the 29th January 1793; it is stated here for the sake of connection.

former obligation, the cautioners in the last have no claim of relief, either total or partial, against those in the first : and it appears difficult to find a good reason why the debtor and his new co-obligant merely by calling the last a bond of *corroboration*, should have it in their power to subject the cautioners in the original bond to so important an obligation as that of relief, especially as the reference to the first bond is commonly the act of the creditor, whose object is not to regulate the relief among the parties, but to preclude any presumption that he has passed from the original bond. It seems therefore to be going far enough to allow the cautioners in the last bond a proportional relief, and to this the granters of the original bond may be held to have consented, as they derive an advantage by having the burden divided among a greater number.

In practice, the Court have sometimes made a distinction between the case where the new cautioner grants the bond of corroboration by himself, and that where he is joined in it by the principal debtor. In the former case, he is held to be cautioner for the original obligants, having right to be totally relieved ; in the latter, as an additional cautioner along with the rest, and only entitled to a proportional relief ; Fountainhall, December 18. 1701, Loch against Lord Nairne ; Harcarfe, No. 243. ; Kames, December 15. 1722, Murray. But in the case, Stair, February 23. 1671, Arnold against Gordon, a partial relief only was found due to a cautioner, even where he was joined by none of the former obligants.

Answered : The original obligants were all jointly bound in the first bond for the whole debt, and Mr Smiton did not enter into the second with any view to lessen the extent of their obligation but merely to grant an additional security to the Banking Company. He therefore did in fact become cautioner for all of them, and of consequence they are liable *singuli in solidum* to him in total relief. If the new bond had been signed by Mr Smiton only, or if, instead of granting it, he had paid the balance due to the Bank and taken an assignment, he would have been entitled to a total relief ; and there seems to be no reason why he should in the present case be in a worse situation ; Erskine, b. 3. tit. 3. § 69. December 1. 1703, Clarkson against Edgar ; Dalrymple, February 14. 1705, Brock against Lord Bargeny ; Falconer, July 10. 1745, Merry against Pollock.

Observed on the Bench : It may be laid down as a general rule, that when there are different cautioners for the same debt, they all stand upon an equal footing as co-cautioners, and are entitled to a proportional relief from one another, whether they are bound in one bond or in separate bonds, unless from circumstances it shall appear either, upon the one hand, that the original bond was meant to be at an end, and the new obligants alone bound, or, on the other hand, that the new cautioners interposed at the desire of the former obligants and to save them from distress, upon the faith of a total relief from them.

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The Lord Ordinary had found Smiton entitled to a total relief.

The Court altered the interlocutor, and found, “ That Millar
“ was only liable to relieve Smiton of a proportional part of the
“ debt due to the British Linen Company along with the other
“ obligants in the original bond of credit.”

A reclaiming petition was refused, without answers, 4th December 1792.

Lord Ordinary, *Henderland*.

For Smiton, *Solicitor-General Blair, Wight*.

For Millar, *Rolland*, et alii.

Clerk, *Mitchelson*.

R. D.

N° IV.

November 16. 1792.

COLIN BROWN,

AGAINST

The MAGISTRATES of Lanark.

PRISONER.—*Act of sederunt, 11th February 1671.*—*When a prisoner on a warrant meditatione fugæ, escapes through the insufficiency of the prison, or negligence of the jailor, the Magistrates of the burgh are not liable for the debt, but they are considered as cautioners judicio sisti; and if the prisoner is recommitted before they are required to present him in Court, no claim lies against them.*

JOHN MARSHALL, who had been incarcerated in the jail of Lanark, on suspicion of horse-stealing, was arrested in prison, (13th August 1791), on a warrant *meditatione fugæ*, at the instance of his creditor Colin Brown.

On the following night, Marshall escaped, owing, it was alleged, to the insufficiency of the prison, or negligence of the jailor.

A few days afterwards, Brown constituted his debt by a decree in absence before the Sheriff. In February following, Marshall was again imprisoned; and at the next circuit-court he was sentenced to be transported beyond seas, for the crime, on account of which he had been originally incarcerated.

Brown pursued the Magistrates of Lanark for payment of his debt, founding chiefly on the act of sederunt, February 11. 1671.

The Lord Ordinary sustained the action, and ordered a condescence of facts; against which interlocutor the Magistrates reclaimed, and

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Pleaded :

Pleaded; 1mo, The responsibility of Magistrates for the escape of a prisoner, a circumstance from which they reap no advantage, and from which perhaps the creditor suffers no loss, is evidently of a penal nature, and founded solely on the act of sederunt, which must therefore receive a strict interpretation. Now, the act speaks only of the *debts of rebels*, i. e. of persons imprisoned on horning and caption, and therefore does not apply to this case.

2do, When a debtor is imprisoned on ultimate diligence, the object of the creditor is to compel payment by the rigour of confinement, whereof any interruption, by the debtor's escape, though he be afterwards recommitted, is in that case a damage, and a ground of claim against the Magistrates; but the sole object of imprisonment on a warrant *meditatione fugæ*, is to obtain security for the prisoner's continuance within the kingdom. And as Marshall has since been recommitted, and is now forthcoming, that object is attained, and no damage can be qualified; 24th January 1786, Gordon against Mellis.

At all events, the Magistrates can only be liable as if they were cautioners for Marshall's appearance. As such, they should have been required to produce him in the course of the pursuer's action; but no such requisition was made.

3tio, Even if Marshall had remained in prison, so as to entitle the pursuer to arrest him on the Sheriff's decree, for the purpose of compelling payment, his person would still have been liable to be withdrawn, on the sentence since pronounced.

Answered: 1mo, The claim against a Magistrate, for the escape of a debtor, lies at common law, on the ground of fault or neglect in the administration of his office. The act of sederunt was merely declaratory of the common law, and thus far in aid of it, that it fixed upon the want of locked doors, or of sufficient fastenings, as facts from which negligence must be presumed. It is therefore to be liberally construed.

2do, Whatever be the object of imprisonment, the Magistrate is equally bound to keep the prisoner safe, and must be equally liable for any culpable failure of attention in that respect.

The recommitment of Marshall does not alter the case. As the debt was constituted only a few days after the debtor's escape, had it not been for that event, he would immediately have been arrested in prison; so that the creditor lost the opportunity of compelling payment *squalore carceris*, during the time he was at liberty. In the case of Gordon, the debtor had been recommitted before the action of constitution was commenced.

Besides, a cautioner, *judicio fisci*, may be required to sist the debtor in court at any period of the process; and particularly at the final pronouncing of decree, the creditor may insist for caution to produce his person during such a time as shall be requisite for carrying the decree into effect by a caption; Masterton against Hutton, and case of Jean Duncan petitioner, in 1790*.

The situation of the defenders is different from that of ordinary cautioners, *judicio fisci*, only in so far as there could be no need

* Neither of these cases are collected.

need of a requisition to them to present a person in court, whom the pursuer was entitled to believe to be already safe in prison.

3^{tio}, The case of the defenders is no way more favourable, from the circumstance of the first imprisonment having been for a criminal cause, than if it had been at the instance of other creditors. The pursuer was entitled to detain him at his instance, till public justice interfered.

Observed on the Bench: The distinction between imprisonment on ultimate diligence, in order to enforce payment, and on a warrant *meditatione fugæ*, is well founded. The act of *federunt*, which is merely declaratory of common law, applies only to the former. When a prisoner on a warrant *meditatione fugæ*, escapes through the fault of the Magistrates, they become cautioners *judicio fisci*; and like other such cautioners, they must be required to present the person of the debtor in court. The defenders might still raise a suspension of the decree in absence, which would be turned into a libel. The pursuer would then be *in petitorio*, and as the person of the debtor has since been recovered, no claim could lie against the defenders.

One *Judge* thought that the act of *federunt* might apply to this case, because the escape had prevented the pursuer from arresting his debtor on the Sheriff's decree.

The Court affoizied the defenders.

Lord Ordinary, *Monboddie*.
Clerk, *Colquhoun*.

Ast. *John Millar junior*.

Alt. *Robert Hamilton*.

D. D.

N° V.

November 20. 1792.

DOUGLAS, HERON and COMPANY,

AGAINST

WILLIAM RIDDICK.

SEPTENNIAL PRESCRIPTION, 1695, c. 5.—*A person expressly bound as cautioner, has the benefit of this statute, though the bond should not contain a clause of relief, and though there should be no separate bond of relief intimated to the creditor at receiving the bond.*

WILLIAM KIRKPATRICK was principal obligant, and Robert Riddick and David Currie were his cautioners, in a bond granted to Douglas, Heron and Company, in 1773.

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13

Riddick's representative, being sued for payment in 1789,

Pleaded the septennial prescription introduced by 1695, c. 5.

Answered: This statute makes a violent encroachment on the common law, and must therefore be strictly interpreted. It declares, That "whoever is bound for another, either as express cautioner, or as principal or co-principal, shall be understood to be a cautioner, to have the benefit of the act: Providing that he have either clause of relief in the bond, or a bond of relief a part, intimate personally to the creditor at his receiving of the bond." As there is neither clause nor bond of relief in the present case, the statute is inapplicable.

Upon this point the Bench were a good deal divided in opinion. Some of the *Judges* thought the existence of a clause or bond of relief absolutely necessary to entitle the cautioner to the benefit of the act.

A majority of the Court however influenced, some solely by the decision, 11th December 1729, *Ross* against *Craigie*; others by considering that the sole object of this clause of the statute, was to inform the creditor of the situation of the obligants, concurred in finding, "That as by the bond in question, the petitioner's (defender's) father was bound expressly as cautioner, there was no necessity for a clause of relief in the bond, or a separate bond of relief, intimated to the creditor, in order to entitle the cautioner to the benefit of the statute 1695 *."

Lord Ordinary, *Dregborn*.

A^ct. Solicitor-General, *Geo. Fergusson*.

Alt. Dean of Faculty, *M. Ross, Corbet*.

Clerk, *Menzies*.

D. D.

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N° VI.

* Several other points on this statute, which occurred between the same parties, were decided at the same time; but the judgment of the Court as to them having been brought under review, they have been collected as of the date of the 2d interlocutor. *Vide* 1st March 1793.

N° VI.

November 28. 1792.

The TRUSTEES of Sir FRANCIS ELIOTT,

A G A I N S T

Sir WILLIAM ELIOTT.

TERM LEGAL AND CONVENTIONAL.—*In grass farms, when the landlord survives Whitsunday, his executor draws a half of the rent payable at Martinmas and Whitsunday thereafter.*

THE late Sir Francis Elliott of Stobs disposed his whole personal estate to certain trustees, whom he also named his executors.

He died on the 20th June 1791, and was succeeded by Sir William Elliott, his son and heir of entail, in the estate of Stobs, which consists of grass farms. The tenants of that estate enter into possession at Whitsunday, and are taken bound by their tacks to pay a half year's rent at the Martinmas after their entry, "for the half year immediately preceding," and another half year's rent at the following Whitsunday, "for the half year preceding that term."

The trustees claimed the half year's rents of the different farms, payable at Martinmas 1791, as part of the executry; and

Pleaded: In order to regulate the distribution of the rents in the hands of tenants, between the heir and executor of the landlord, the fiar and executor of the liferenter, practice has established Whitsunday and Martinmas as two legal terms, from which, whatever may be the conventional terms of payment, the rents payable for the crop of the year current, at the death of the predecessor, shall be held to have been *in ejus bonis*, and to transmit to his executors. If he survives Whitsunday, his executors get a half; if Martinmas, the whole of the rent payable for that crop. Erskine, book 2. tit. 9. § 64. This rule, found to be a very convenient one, was probably introduced from its having been the old custom in this country, for tenants to pay their rent, the one half at the Whitsunday before, the other at the Martinmas after the corn-crop was reaped. It took place at first, perhaps only in the case of corn farms; it is now equally applicable to grass ones. In the following cases, February 1727, Sir William Johnston against Marquis of Annandale; Dict. vol. ii. p. 453. 4th June 1741, Pringle against Pringle, Kilkerran, p. 565.; and 3d July 1760, Kerr of Houselaw against Turnbull *, where the terms of entry, and conventional terms

of

* Not collected.

of payment, were the same as in the present case, the Court found that the heritor, by surviving Martinmas, transmitted to his executors the rent payable by convention at the Whitsunday following; and although in the case 11th June 1745, Campbell against Campbell, Kilkerran, p. 566. the Court allowed a proof before answer, to a certain effect, the point now in dispute was taken for granted.

Answered: The portion of rent which goes to the executor is the same that was actually due to the deceased himself; what was not due to him, goes to his heir.

Each term's rent is payable for the corresponding period of actual possession, though, in consequence of positive agreement, it may not then be exigible. In corn farms, as the tenant enters to the arable lands at Martinmas, so at the following Whitsunday he owes a half year's rent, for his half year's possession; and this the heritor, if he survives that term, will transmit to his executors. By the same rule, if the tenant only enters to a grass farm at Whitsunday, no rent can be due till the following Martinmas; and the heritor dying before that period, can transmit no part of it to his executors.

In grass farms, the legal and conventional terms of payment are generally the same. The tenant enters into possession at Whitsunday, and pays one half of the rent at Martinmas, the first, the other at Whitsunday, the second legal term after his entry. Hence, as Sir Francis died before Martinmas, when the first half became due, as well as exigible, he cannot transmit it to his executors.

The point has not yet been settled by decisions. The case of Kerr, which is the last, was taken out of Court by compromise before a final judgment: and in that of Campbell, no decision of the point of law was given, but only a proof before answer allowed. The notion too which appears to have weighed in the decision of the two older cases, viz. that in grass farms, the whole rent is payable for the possession during the summer months, would seem to be equally inconsistent with the fact, and with the settled rule of law, which has divided the rents into moieties, and appointed a legal term for the payment of each; Dict. vol. ii. p. 453.; Kames Eluc. p. 65. *et seqq.*

The defender's general doctrine is also confirmed by the terms of the tacks in this case, which declare that each half year's rent is payable "for the half year preceding that term."

Observed on the Bench: In whatever manner the tack may be expressed, it is plain, that in a grass farm the entry being at Whitsunday, the grass crop of that year is the tenant's *first crop*; and although he pays no rent till Martinmas and Whitsunday thereafter, yet this rent when payable is for the preceding crop and year, not for the subsequent. Anticipating the term of payment may have an effect upon the succession, but postponing it can have none.

The Lord Ordinary had sustained the defences, “both on the general point, and on the special terms of the tacks of the grass farms in question.”

The Court altered that interlocutor, and found that the half year’s rent payable at Martinmas 1791, belonged to the trustees.

Lord Ordinary, *Dregborn.*
Clerk, *Home.*

A&T. Lord Advocate, *Wight.*

Alt. *Tait.*

D. D.

N° VII.

December 4. 1792.

JANE DOLLAR and her HUSBAND,

AGAINST

JOHN DOLLAR.

PROVISION TO HEIRS AND CHILDREN.—*A destination of lands in a marriage-contract, “to heirs or children, one or more,” how to be interpreted?*

THE father of John Dollar, in his son’s contract of marriage, disposed certain lands “to him and his wife in liferent, and “to the heirs or children, one or more, lawfully to be procreate of the marriage, in fee, (*as shall be disposed of* by the father to “them).” The procuratory of resignation was simply in favour of the “heirs” of the marriage. And the conquest was by another clause given “to the child or children.” The lands disposed were held burghage of the burgh of barony of Kirkintilloch, and consisted of about 60 acres. The parties differed about their value, but they appear to have been worth from L. 70 to L. 100 Sterling yearly. They had been in the same family for above 200 years, and the privilege of being a burghers of Kirkintilloch was annexed to them.

Of this marriage there were seven children; John Dollar junior, Jane, and five other daughters.

In 1776, John Dollar, their father, executed a disposition of the whole subjects contained in the contract in favour of his son, and in 1787, he died, leaving personal debts nearly equal to his moveable property.

After the father’s death, Jane and her husband brought the present action against her brother, concluding to have it declared, that in virtue of the destination “to heirs or children,” in her father’s contract of marriage, she was entitled to an equal share, along with her brother and sisters, of the subjects thereby disposed; and

Pleaded: If it had been intended by the devise in the marriage-contract, that the heir at law should succeed, the addition of the words "or children" was altogether superfluous. The natural meaning of the expression, and indeed the clear intention of the parties in using it, must have been, that the whole children might succeed as heirs of provision. The subsequent part of the clause giving the father a power of division, as it did not entitle him to exclude entirely any of his children, is also favourable to the pursuer's argument, by shewing that her grandfather had no predilection for the eldest son, who might thereby have been cut off with a very small share.

From the nature of the property likewise, consisting of a number of detached pieces of ground, the representation of a family could not enter into the views of the contracting parties. Accordingly, in destinations similar to the present, where the subject was either money heritably secured, or land-property of a trifling value, the Court have been in use to decide in favour of the whole children, especially in cases where the lands held burgage. Indeed, in the late case of Fairservice against White, quoted by the other party, it was admitted by the heir at law, that subjects held by this tenure, when destined to heirs and bairns, would in every case go to the whole children equally. See Dictionary, vol. ii. p. 275. 13th June 1760, Creditors of Scott against Scotts; 1st December 1769, Wilsons against Wilson*.

Answered: The subject contained in the contract, although holding of the burgh of Kirkintulloch, is a considerable property, both in point of extent and value. It has been handed down from father to son for many generations, and is in every respect different from common urban tenements, which are in general so small as to make it necessary for their proprietor to engage in some handicraft for his subsistence. Accordingly, in judging of the meaning of destinations like the present, where the subject in dispute fell to be considered as a proper landed estate, the Court proceeding on the authority of our law writers, the probable intention of parties, and the legal presumption in favour of primogeniture, have always preferred the eldest son; Dirleton and Stewart, *voce* Heirs of Provision; M'Dowal, b. 3. tit. 5. § 48. 13th February 1768, Kempt against Ruffel*; Fac. Coll. N° 69. 17th June 1789, Fairservice against White.

As to the subsequent words in the dispositive clause, "as shall be disposed of by the father to them," their sole purpose seems to have been to put it in the father's power to disappoint the succession of the heir at law, if he should be so inclined. It appears, however, that so far from wishing to exercise this power, he corroborated the destination laid down in the contract, by granting a disposition in favour of his eldest son.

The Lord Ordinary pronounced the following judgment: ' Finds the destination in the contract in question calls all the children of the marriage "as heirs of provision," and that they were thereby entitled each to an equal share, if the father did not
E ' make

* Not collected.

‘ make a division: Finds, That the subsequent part of the clause, “ as shall be disposed of by the father to them,” gave him no greater power than is implied in such cases; and that though both powers enabled him to make an unequal division, yet neither enabled him to give the whole to one, or totally to exclude any of the children.’

On advising a reclaiming petition, with answers, the Court (27th June 1792) altered this interlocutor, and “ sustained the defence “ with regard to the lands contained in the contract of marriage “ libelled on, and affoizied the defender.”

The pursuers reclaimed; but on advising the petition, with answers, the Lords adhered to their former judgment.

Lord Ordinary, *Dregborn.*
Clerk, *Menzies.*

Aft. *Fletcher.*

Alt. *Dean of Faculty, Wight.*

R. D.

N° VIII.

December 19. 1792.

A M E L I A L E I G H,

A G A I N S T

J A M E S R O S E.

FOREIGNER.—*An attorney defending in an action for a person abroad, is not liable personally for the expences awarded against his constituent.*

AMELIA LEIGH having prevailed in an action of declarator of marriage, before the Commissary-court, against Robert Sinclair, was found entitled to expences. As Mr Sinclair was out of the kingdom, she insisted that Mr Rose, who had defended in the action, in virtue of a power of attorney from him, should be found personally liable for them; and so the Commissaries found.

Mr Rose having brought an advocacy of this judgment,

Pleaded: Although the factor for a foreigner, *pursuing* in this country, has been found personally liable in expences, Kilkerran, *voce* Foreigner, it is not equitable that this rule should be applied to the attorney of a foreign defender. A foreigner not being amenable to the courts of this country, it is reasonable, if he pursue in a groundless action, that he should find a person on the spot who shall be answerable for the costs. But before an action is commenced

commenced against a defender, either his person or his effects ought to be found in this country, in order to constitute an effectual jurisdiction over him. And in consequence of its being established in this manner, if the pursuer is found entitled to costs, it necessarily follows, that either the defender's person or his property must be liable to diligence at his instance, in order to render his claim for them effectual. There is not therefore the same occasion for subjecting his attorney personally; and without an absolute necessity, the law will never deviate so far from ordinary principles, as to make a factor liable for his constituent's debt. Besides, it is voluntary in a pursuer, but necessary for a defender, to come into Court. It would therefore be inconsistent to force his attendance under a penal certification, and at the same time insist on his finding caution for the expences incurred by the pursuer, which might in many cases preclude his appearance.

Answered: The steps which an attorney for a foreigner, whether pursuer or defender, takes in a process, are considered as the attorney's own proper acts and deeds, and therefore he must be personally liable for their consequences.

The Lord Ordinary remitted to the Commissaries, "with this instruction, to assilzie James Rose from expences."

On advising a reclaiming petition, with answers, the Court adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Justice-Clerk.*
Clerk, *Home.*

A&C. D. *Smyth.*

Alt. M. *Rosi.*

R. D.

N° IX.

December 22. 1792.

JAMES BEGBIE,

AGAINST

Sir CHARLES ERSKINE.

HEIR APPARENT.—*An heir apparent who declines entering, is bound to take a day to renounce, although he should be decerned executor quæ nearest in kin to his ancestor.*

JAMES BEGBIE obtained a decree before the Admiralty Court, for payment of the balance of an account against the late Sir Charles Erskine, who brought the judgment under review by suspension.

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Sir

Sir Charles died, and the action was transferred against Sir William his eldest son, who having also died, it was transferred against Sir Charles Erskine, the present defender, who then became heir apparent to the late Sir Charles his father.

In this action, he contended, that although he did not propose to represent his father and brother *passive*, he was not bound to produce a renunciation as heir to them, because he was *in cursu* of confirming himself executor to both, in which character alone he would be able to discuss the charger's claim with safety: That as no inventory of his father's succession had been made *intra annum deliberandi*, he could not now enter heir to him *cum beneficio*; a hardship which had been occasioned by no fault of his, as his brother Sir William had survived his father more than a year: That if in his character of executor he should establish, that the charger's claim was ill founded, his right to insist either for a decree against him, or for his renouncing, would be at an end; whereas, if he were obliged *in hoc statu* to give in a renunciation, it would be in the charger's power, after getting a decree *cognitionis causa*, to attach by adjudication any heritage belonging to the late Sir Charles, although it should afterwards appear that his claim against him was ill founded.

The Lord Ordinary found, "That the circumstance of the defender being decerned executor *qua* nearest in kin to his deceased father and brother, does not afford any ground for exempting him from being subject to the ordinary course of law;" and therefore "he assigned a day for him to give in a renunciation."

A reclaiming petition for Sir Charles was refused without answers.

Lord Ordinary, *Dregborn.*
Clerk, *Home.*

For the Petitioner, *Dean of Faculty, D. Douglas.*

R. D.

N° X.

January 15. 1793.

JOHN FINLAY, and others,

A G A I N S T

JOHN NEWBIGGING, and others.

BURGH ROYAL.—*A corporation of tradesmen cannot employ its funds, or assess its members, for defraying the expence of supporting general plans of reform.*

THE weavers of Lanark were formed into a corporation, or at least had their privileges confirmed by a seal of cause from the Magistrates of that burgh, in 1660. The object of the institution is declared to be, That “the said craft might flourish and grow to some perfection, and that the people of the town and country be not damnified by unlawful work, but for advancement of the corporations of the said burgh, and weel of the said craft, and help of any of their distressed brethren;” and they are allowed to exact fines from persons entering into the corporation.

In consequence of several resolutions of the majority, about L. 7 Sterling had been taken from their funds for the purpose of supporting an application to Parliament for a reform in the government of the royal burghs; and an assessment of 1 s. *per annum* had been laid on each member, in order to replace that sum.

John Finlay and others having refused to continue their annual payment, the corporation resolved, that “they should be set aside from the trade,” and not called to any meeting while they continued in arrear.

Finlay and the other excluded members brought a process of declarator, in which John Newbigging the deacon, and the other members of the corporation, were called as defenders. The material points at issue came to be, 1st, The powers of the majority in the disposal of their funds: 2^d, Their right of imposing assessments on the members.

The leading arguments on both sides, as to the first point, were similar to those employed in, and reference was made to the case of Montgomery and Macauland, stated in number 12th.

On the second point the pursuers

Pleaded: Corporations were formed for the protection of trade, and the resolutions of the majority are only binding on the rest, when they are necessarily connected with the primary object of the institution, or with the internal government of the society;

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Erskine,

Erskine, b. i. tit. 7. § 64.; *Perez. in cod. lib. 11. tit. 18. § 18.*; *Stat. 1424, c. 39.*; Bacon's Abr. v. Corporation; Peere Williams Reports, vol. ii. p. 209.; Viner, v. By-law, p. 319.; Bruce, 17th June 1715, Magistrates of Aberdeen against Speediman. The resolution to support the burgh reform falls not under either description; and the assessment in question not being authorised by the seal of cause, must be considered as a tax imposed without legal authority; 14th June 1762, Burgeses of Kinghorn against the Magistrates; 15th June 1781, Tod against the Magistrates of St Andrew's.

Answered: If the corporation are entitled to employ a part of their funds in procuring a reform in the burghs, there can be little doubt of their right to impose a small assessment on the members for the same purpose. Indeed, this last mode is more unexceptionable than the other, as there is less risk of its being abused. Accordingly, there is scarcely a corporation in the kingdom which has not assessed its members for various purposes, and in no case has this power been called in question.

At any rate, as the pursuers concurred in imposing the assessment, they are barred *personali exceptione* from making the present objection.

The Lord Ordinary found, "That the corporation may voluntarily assess themselves in such sums of money as their circumstances can admit of, for any useful and lawful purpose, such as an application to the Legislature for a redress of grievances, as in the present case; and in respect of the accession of the said John Finlay and the other pursuers, in laying on the small assessment now complained of, that they are bound to pay their several proportions of the same," &c.

Upon advising a reclaiming petition and answers, it was

Observed on the Bench: The funds of the corporation were meant for defraying the necessary expences attending the management of their affairs as a corporation, and the maintenance of their poor. These funds, therefore, cannot be employed in supporting speculative plans of reform; nor can a majority bind a minority in such cases. If the majority should next year be of the opposite opinion, could the corporation-funds be employed in maintaining both sides of the question? A corporation has no power of imposing new assessments of any kind on its members for the most salutary purpose, unless authorised by statute; see 15th November 1754, Town of Lauder against Brown; 29th June 1786, Fergusson against Magistrates of Glasgow; 24th February 1790, Riddel against Magistrates of Dumfermline*. But the pursuers may be bound by their accession.

The Lords found, That the respondents (Newbigging, &c.) had no right to apply the funds of the corporation, or to assess one another

* Not collected.

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another for the purposes mentioned in the interlocutor, but remitted to the Lord Ordinary to enquire how far any individual members had bound themselves by voluntary agreement.

Lord Ordinary, *Ankerville.*
Clerk, *Mitchelson.*

For Finlay, &c. *Robert Hamilton.*

Alt. *D. Catcart.*

• D. D.

N° XI.

January 16. 1793.

JOHN WILSON, and others,

AGAINST

JAMES SCOTT, and others *.

The same Point.

THE same question which occurred in the preceding case was decided in another, in which John Wilson and other members of the Corporation of Hammermen in Glasgow were pursuers, and the late deacon and masters were defenders.

The dues paid by persons entering into that corporation, are by a charter granted by the Magistrates of Glasgow in 1570, directed to be paid "unto the box of the craft, to be bestowed upon the common charges of the said craft, and supporting the poor decayed brethren thereof."

The defenders, when in office, had concurred with a majority of the corporation in voting and paying from the funds L. 20 Sterling, in order to support an application to Parliament for a reform in the government of the royal burghs.

The pursuers complained to the Magistrates of Glasgow, who found, that employing the funds in this manner was perverting them from their proper use, and was *illegal*, and that the defenders were liable, conjunctly and severally to refund the money advanced, reserving to them recourse against each other, and the other members of the corporation who had voted for the measure.

A bill of advocation, complaining of this judgment, was passed; but the cause having been reported by Lord Dreghorn on informations, the Lords "repelled the reasons of advocation, remitted the cause *simpliciter* to the Magistrates, and found the raisers of the advocation liable in expences."

A reclaiming petition was refused, without answers, on the 5th February 1793.

Lord Reporter, *Dreghorn.*

Alt. *Solicitor-General, Ar. Campbell.*

Alt. *Dean of Faculty, Wight, Cullen,*

Clerk, *Sinclair.*

D. D.

N° XII.

January 16. 1793.

JOHN MACAUSLAND, and others,

A G A I N S T

JAMES MONTGOMERY, and others, and the MAGISTRATES
of Glasgow.JURISDICTION.—BURGH ROYAL.—*Court of Session may controul corporations in the management of their funds.—Nature of such funds.*CLAUSE.—*Meaning of the expression “good and pious uses.”*

THE Trades-house of Glasgow is composed of delegates from the fourteen incorporated trades of that city. At a meeting of that body, it was resolved to contribute a sum not exceeding L. 500, and in proportion to their funds with those of other corporations, in order to oppose a bill which the Magistrates meant to bring into Parliament, for maintaining the police, and extending the royalty of the city. And at a subsequent meeting, they authorised their collector to advance in the mean time L. 100, if necessary, for that purpose. Against this resolution, a protest was immediately taken by James Montgomery, and others, and a petition and complaint presented to the Magistrates of Glasgow, who pronounced an interdict prohibiting payment of the money.

In the mean time, the bill was brought into Parliament; counsel were heard against it; and, on the motion of the member for the city of Glasgow, it was delayed for three months.

John Macausland, then deacon-convener, and others, complained of the judgment of the Magistrates by bill of advocation, and at the same time brought an action of declarator, in order to ascertain the powers of a majority of the Trades-house in the management of its funds, in which the Magistrates were cited as defenders.

The two actions came into Court at the same time, when Montgomery, &c.

Pleaded: 1mo, Beside the public revenue of a burgh which is intrusted to the management of its Magistrates and Town-council, there are in most burghs common funds belonging to particular classes of men, who associated by seals of cause, or otherwise, for the purposes of trade, and enjoying such exclusive privileges, as were at an early period thought necessary for its protection, have been allowed to exact dues of admission, and to acquire property by donation; these funds are chiefly applicable to the maintenance of their own poor.

The incorporated trades of Glasgow, besides a fund belonging to each, have a common stock, under the management of the Trades-house.

The merchants (in which class are included not only foreign traders, but all who keep a shop) have a similar fund under the management of a similar body, called the Merchants-house.

Certain disputes having arisen between the artificers and merchants about the extent of their privileges, all parties concerned concurred in referring the points at issue to the Ministers and Magistrates of Glasgow, by whom a decree-arbitral was pronounced on the 6th February 1605, defining the rights and privileges of the Trades and Merchants-house. This decreet-arbitral, known by the name of the Letter of Guildry, was confirmed by Parliament in 1672.

By this letter *, the power of the Magistrates to review the resolutions of the Trades-house, is expressly acknowledged.

Most probably at that time, as at present, the poor of the crafts were maintained partly in their hospital, and partly as out-pensioners. The entry-money was intended for their joint behoof; the portion appropriated to the former was called *Hospital*, that to the latter *Guildry*-money. But the management of the whole is, by the letter of guildry, vested in the deacon-convener, and other deacons, to be applied "to their hospital and decayed brethren, or to any other good and pious use, which may tend to the advancement of the commonwell of the burgh," without distinguishing between one part of it and another. They have therefore the same powers over the whole, and if they can employ a part, they may employ the whole in opposing or promoting a bill in Parliament.

But the purposes intended were exclusively charitable. The money is to be applied, *1mo*, To the hospital; *2do*, To the maintenance of decayed brethren; *3tio*, To any other good and pious use. The third use is described as being of a similar nature with the two former. The terms good and pious must be taken in conjunction with each other, and indeed in the language of that day were synonymous.

Accordingly,

* The clauses of the letter of guildry referred to are :

Sect. 20. That every man out of town, whether merchant or craftsman, being not as yet neither burgher nor freeman within this burgh, who shall enter hereafter, &c. shall pay for his guildry after he is made burgher, thirty pounds Scots, and to the hospital of his calling thirteen shillings and four pennies, except he marry a guildbrother's daughter, who then shall only pay twenty shilling, and forty shilling to the hospital of his calling.

21. Whatever person who is not presently burgher and freeman of this burgh, and enters hereafter burgher gratis, shall pay for his guildry forty pounds money, with forty shilling to the hospital of his calling.

22. And all that is gotten and received from any craftsman and their assistants, who shall enter guildbrethren, shall be applied to their hospital and decayed brethren of the craftsmen, or to any other good and pious use, which may tend to the advancement of the commonwell of the burgh, and that by the deacon-convener, with advice of the rest of the deacons.

42. The deacon-convener shall be obliged to produce his book, containing the whole acts and statutes, which he shall happen to set down before the Provost, Bailies and Council, to be seen and considered by them yearly, when required, and shall crave their ratification and allowance thereto, if otherwise, to be found of no effect.

Accordingly, the whole money received by the Trades-house is thrown into one common fund, which (with a very few exceptions, which are recent, and have not been challenged), has been uniformly employed for the use of the poor, and when the stock was to be laid out either by way of loan, or in the purchase of property, the bonds and rights have always been taken for their behoof.

The practice of the Merchant-house in the management of their funds, has been precisely similar.

2do, Even supposing the Trades-house might apply their funds to any purpose beneficial to the incorporated trades, their opposition to the police-bill is not of that description.

Answered: 1mo, In this, as well as in every other civilized country, corporations have been established, some of them, with a view to civil, others merely to eleemosynary purposes. Corporations of artificers, come clearly under the former denomination. The protection of trade was the leading object of their constitution; the spirit of monopoly led them to grasp at an extension of their privileges, and accordingly various statutes were made to defend them, not only against the interference of strangers, but of each other, and of the merchants, who had an association of their own, with similar privileges; *ll. burgorum*, c. 18.; *Stat. Gulielmi*, c. 35. 37. 1457, c. 67. 1466, c. 11, 12. 1487, c. 106, 107. 1592, c. 154. 156. 1607, c. 6. 1621, c. 12.

And as the individuals composing the different trades were too numerous to admit of their meeting collectively to deliberate on matters of common concern, each corporation sent delegates for that purpose. Hence the origin of the Conventry, or, as it is called in Glasgow, the Trades-house.

The essence of an eleemosynary corporation, is the revenue bestowed on it by the founder, which must be managed as he has directed; Blackst. vol. i. p. 465; Raymond's Reports, vol. i. p. 8.

But no original revenue was bestowed on the corporations of artificers. Their funds have arisen from the contributions of their own members, and the donations of individuals; unless therefore, where the donor has prescribed the mode of application, there is no reason why they should not have the free management of the property thus acquired, or why courts of law should interfere, provided they do not apply their funds to the private use of individual members, but endeavour, *bona fide*, to promote the object of their institution; Blackst. b. 1. c. 18.; Gilbert, New Abr. vol. i. p. 499. 500. 506.; Comyns, vol. i. § 162. 168.; vol. iii. p. 407.; Erskine, b. 1. tit. 7. § 64. ff. l. 6. *de rer. div. l. 1. quod cujuscunque universit*; Peere Williams Reports, p. 207.

As the protection of their civil privileges was the sole intention of their formation, their funds should naturally be chiefly employed in promoting that object, and when they exceed what is necessary for that purpose, a part may very properly be applied to the secondary object of maintaining their poor. But in none of the authorities above quoted, is it said, and indeed it would be unreasonable

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sonable to suppose that their whole funds must be employed in that manner. Besides, as the funds of the different corporations in Britain amount to some millions, the propriety of applying that sum solely to the use of the poor, may well be disputed. Burn's Poor Laws, Macfarlan's Enquiries.

In this case, the letter of guildry ascertains what part of the entry-money is paid for behoof of the hospital, and what for the guildry, i.e. common good of the crafts. The former bears no proportion to the latter, and has annually been expended in purposes of charity. The present funds therefore, which are very considerable, have arisen entirely from the latter, upon which the poor can have no legal claim.

The fair interpretation of the 22d article of the letter of guildry is, that the funds may be applied to any honest and laudable purpose undertaken for the general good of the crafts, and that the deacon-convener and other deacons shall be the sole judges of the proper occasions.

It was intended by the letter of guildry, to give the Magistrates a power of controul over the acts of the Trades-house only, when they were such as might affect the internal police of the burgh; and as there is no instance of any act receiving their ratification, that power has been lost by disuse.

2do, But even granting that the acts of the Trades-house were subject to review, the police-bill was liable to objections, which warrant the opposition made to it.

The Lord Ordinary ordered informations. At advising which, it was

Observed on the Bench: The funds of public bodies must be applied to the purposes for which they have originally been appropriated. In this case there is a discretionary power in the Trades-house, but subject to the controul, first of the Magistrates of Glasgow, and afterwards of this Court.

The merits of the police-bill, as affecting the Trades, must determine the propriety of voting money to oppose it. The objections hitherto stated do not justify that opposition.

The Lords pronounced the following interlocutor: "Find that the raisers of the advocacy have not yet instructed a good cause for opposing the police-bill in question; or that the Trades-house had a good ground for voting money out of the funds for maintaining that opposition; and therefore continue the interdict pronounced by the Magistrates of Glasgow, and decern: Find them also liable in expences, of which ordain an account to be given in; and in the process of declarator, find that the letter of guildry, dated the 6th February 1605, is still in force, and that the parties must conform thereto, and decern and declare accordingly: Find the pursuers liable in expences, and ordain an account to be given in."

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A reclaiming petition was appointed to be answered. Answers were given in, but the petition was afterwards withdrawn. In these papers, the points chiefly insisted on, were the merits of the police-bill, and the nature of the opposition made to it.

Lord Reporter, *Dreghorn*. For Montgomery, &c. *Solicitor-General*,
Archibald Campbell. For Macauland, &c. *Dean of Faculty*, *Wight*,
Gullen. Clerk, *Sinclair*.

D. D.

N° XIII.

January 17. 1793.

The MAGISTRATES and TOWN-COUNCIL of Paisley,

A G A I N S T

The FREEHOLDERS and COMMISSIONERS of SUPPLY
of the County of Renfrew.

BURGH OF BARONY—*having a sufficient jail, is bound to maintain prisoners in it for crimes committed within the burgh, out of its own funds; but is entitled to relief from the rogue-money for the maintenance of persons confined in it for crimes committed in the other parts of the county.*

PAISLEY is a burgh of barony, formerly holding of the Abbey of Paisley, and now of the Crown. It has kept up for many years a very secure jail, in which, owing to the insufficiency of the county prison in the royal burgh of Renfrew, most of the prisoners for crimes committed within the shire have been confined.

A difference of opinion having taken place between the Magistrates and the freeholders of the county, respecting the burden of maintaining these prisoners, the Magistrates brought two actions against the Freeholders, Commissioners of Supply, and the collector of the rogue-money; the one concluding for certain sums expended by them, in maintaining prisoners for crimes committed within the county, exclusive of the town; and the other for sums expended in supporting prisoners for crimes committed within Paisley.

The freeholders seem not to have opposed the former, but they disputed the justice of the latter claim; and in its support the pursuers

Pleaded: Royal burghs alone are by law obliged to have jails. Paisley being merely a burgh of barony, is therefore not bound to have a prison at all. Mackenzie's Observations on the act 1597, c. 277; Stair, b. 4. tit. 47. § 19.; M'Dowall, b. 1. tit. 10. § 197.; Erskine, b. 4. tit. 3. § 13.; Dictionary of Decisions, vol. ii. p. 166. If it had none, the whole criminals in the county, without distinction, would be sent to the jail of Renfrew, and there maintained out of the rogue-money, of which Paisley pays its proportion. It would be unjust, that by the voluntary act of upholding a prison, the Magistrates should be loaded with the expence of maintaining any part of the prisoners; more particularly, as by doing so they render themselves responsible for the escape of prisoners for debt, which is of itself a very considerable hardship. The statutes upon this subject lay the burden of maintaining criminals upon the district where they are found, without distinguishing where or by what judge they are apprehended; 1579, c. 74.; 1617, c. 8. § 16. and 17.; 11 Geo. I. c. 12.; Erskine, b. 1. tit. 4. § 17.

Answered: The Magistrates have been in the immemorial practice of maintaining, out of their own funds, all the prisoners for crimes committed within the burgh; and this, it is believed, is the practice of every burgh in the kingdom. Indeed they are bound to do so from the very nature of their tenure. Watching and warding are the *reddenda* by which they hold their rights, and they are thereby bound not only to secure the peace of the lieges, by apprehending those who offend against it, but by detaining them in custody, till they are liberated in due course of law.

The act 1597, c. 273. puts all burghs as to the point at issue in the same situation. The statutes referred to by the pursuers, so far as they have any connection with the present subject, seem to relate to counties or districts, in contradistinction to the towns contained in them. At any rate, nothing less than an express enactment of the Legislature could load the landed interest with, and free the burghs from a burden which was the onerous cause of their erection.

Besides, Paisley, although a burgh of barony, holds of the Crown, and is on an equal footing with a royal burgh, in the enjoyment of every privilege except that of a share in the Parliamentary representation. It is also a large and opulent town, well able to support its own prisoners.

The Lord Ordinary reported the cause on informations.

Some of the Judges were of opinion, that the county should maintain the whole criminals, because Paisley was only a burgh of barony. The Court, however, influenced a good deal by the practice in this case, found, that "the pursuers are bound, out of the town's funds, to maintain all criminals incarcerated in their prison, for crimes committed within the town; but that they are entitled to be refunded out of the rogue-money of the county, of the expence of maintaining in their prison all criminals

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"imprisoned

“ imprisoned therein for crimes committed within any other part
“ of the county *.”

Lord Reporter, *Dregborn.* *Ad. Cullen & alii.* *Adv. Wight, G. Fergusson.*
Clerk, *Horne.*

R. D.

N° XIV.

January 19. 1793.

WILLIAM MACDOWALL and GEORGE HOUSTOUN,

A G A I N S T

JAMES HAMILTON.

MEMBER OF PARLIAMENT.—HEIR APPARENT.—*An heir apparent may be enrolled, although his predecessor had only a base infeftment, which has been made public by confirmation since his death.*

JAMES HAMILTON was inrolled as a freeholder in the county of Renfrew, in the character of heir apparent to his father, upon production of the following titles: *1mo*, A disposition of lands in favour of his father, affording a qualification: *2do*, An instrument of seisin, proceeding on the precept in the disposition: *3tio*, A charter of confirmation of the disposition and infeftment obtained by the claimant after his father's death. In a petition and complaint, Messrs Macdowall and Houstoun

Pleaded: An heir apparent is only entitled to be enrolled where his predecessor could have claimed that privilege.

But the claimant's father having only a base infeftment, was not qualified, and the charter of confirmation obtained after his death cannot be considered as part of his titles; 3d July 1753, Abercromby against Gordon.

Answered: A charter of confirmation makes the base infeftment public from its date; Erskine, b. 2. tit. 7. § 15.; Stair, b. 2. tit. 3. § 28. The intermediate death of the party infeft does not hinder its operation; and to entitle an heir apparent to be enrolled, it is sufficient for him to produce titles in the person of his predecessor, which would have given him that privilege.

The

* In this question the pursuers were at some pains in making enquiries with respect to the usage in other burghs of barony. From these, it appeared, that the practice had not been uniform, nor settled on any general system.

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The Court, upon the grounds stated for the defender, dismissed the complaint.

A. G. George Ferguson.

Alt. Chas. Hay.

Gordon, Clerk.

D. D.

N° XV.

January 22. 1793.

GEORGE ROSS, and others,

AGAINST

SARAH AGLIANBY.

APPEAL.—Deeds of settlement containing a nomination of executors, having been reduced by the Court of Session, the nearest in kin may get themselves confirmed during the dependence of an appeal against the decree of reduction, to the effect of vesting a title in themselves from the date of the confirmation in case the judgment should be affirmed.

GEORGE ROSS and others applied to the Commissary of Dumfries to be decerned executors dative *qua* nearest in kin to the late Richard Lowthian.

Sarah Aglianby, Mr Lowthian's widow, stated objections to the edict founded on certain deeds, in which she was named his executor. These deeds, she admitted, had been reduced by the Court of Session; but she contended, that as she had entered an appeal against their judgment, no person ought to be confirmed during its dependence.

The Commissary accordingly "delayed giving any decision in the edict till discussing of said appeal."

The Lord Ordinary refused a bill of advocation complaining of this judgment.

The nearest in kin presented a reclaiming petition, stating, that as one of their number was 76 years of age, and in a valetudinary state of health, there was much reason to apprehend, that any delay of the confirmation might have the effect of altering the course of succession. And that, although the service of the writ of appeal must no doubt stop the execution of the decree of reduction, yet it could not restore the deeds reduced, which were *in hoc statu* to be considered as nonentities, and therefore they could not operate as a bar to the confirmation. See Dictionary, *voce* Appeal,

peal, 19th July 1710, Lyon and assignee, against Lady Kinnaird ;
Wallace, 2d July 1774, Heron against Heron.

Observed on the Bench: The petitioners ought to be allowed to proceed in completing their titles, to the effect of vesting the right, and enabling them to transmit it to their own nearest in kin, if they should happen to die in the mean time.

The Court granted the prayer of the petition, for the purpose of vesting a title, upon the petitioners agreeing not to intromit till the appeal should be discussed.

Lord Ordinary, *Dunfries*.
Clerk, *Mennies*.

For the Petitioners, *Geo. Fergusson*.

R. D.

January 22. 1793.

The TRUSTEES of Sir FRANCIS ELIOTT,

AGAINST

Sir WILLIAM ELIOTT.

TAILZIE.—10th Geo. III. chap. 51.—*Trustees of the proprietor of an entailed estate found entitled to claim from the succeeding heir, three fourths of the sums expended in improving it, though he had taken grassums, and had not raised the old rent.*

Whether the notice given to the succeeding heir of entail must specify every particular of the plan of improvement intended.

THE late Sir Francis Elliott held the estate of Stobs under a strict entail, but which contained no limitation as to letting leases and taking grassums. It was his usual practice after improving his farms, to let them in leases for 19 years, at the old rent, and to exact a grassum at their commencement.

In an action brought upon the 10th Geo. III. chap. 5. by which the proprietors of entailed estates may, under certain conditions, have three fourths of the money which they lay out in improving them, declared a burden upon the succeeding heirs of entail, he was found entitled to charge the sum of L. 1926 : 15 : 3 $\frac{4}{12}$ against them.

The sum which had been thus ascertained, Sir Francis conveyed to trustees for payment of his debts, and other purposes; and when,

when, after his death, his trustees came to demand payment, Sir William Elliott, the succeeding heir,

Pleaded : When formerly the proprietors of entailed estates had no means of improving them, without diminishing the fund for providing their widows and younger children, or, if they died, before reaping the advantage, without making a present of the money expended to the succeeding heirs, their estates, as might be expected, were exceedingly neglected. The sole object of the statute was to enable them to improve their estates without diminishing their executry.

But if the present claim is supported, the proprietor of every entailed estate has an easy method of nearly doubling his executry. By taking grassums he recovers what he has expended in improving it, while at the same time three fourths of the sum are made a burden on the succeeding heirs of entail. And in this way, contrary to justice, and the evident intention of the Legislature, the succeeding heir becomes a loser by the improvement of his estate.

It may indeed happen, even where no grassum is taken, that notwithstanding the precautions of the statute against injudicious application of the money, the projected improvements may not raise the rent : That, however, is a *casus fortuitus*, which cannot be foreseen; but here the law is wilfully evaded, 15th January 1761, Sir Archibald Denholm against William Wilson.

Answered : As the enactments of the statute are clear and unambiguous, no conjectures as to the meaning of the Legislature can be admitted. However advantageously the holder of an entailed estate may have employed his money in improving it, he will have no claim against the heirs of entail, if he has not rigidly followed out the directions of the statute. On the other hand, if he obeys them, the statute does not require that this expenditure should be beneficial to the succeeding heir.

There is nothing in the statute, nor in the present case in the entail, to prevent the heir from letting leases, even below the old rent, and taking grassums to any amount. By taking grassums, he does not become debtor to the succeeding heir, who cannot therefore, by compensation on their account, get rid of a debt, with which a public statute, and a decree of this Court, has burdened him.

The Lord Ordinary pronounced the following interlocutor :
 “ Finds, That the late Sir Francis Elliott of Stobs, being laid under no restriction by the entail of that estate, had power to grant leases at the former rent, and take grassums ; finds, That as in case he had not laid out money on said estate, the succeeding heir of entail could not have claimed from his representatives the whole or part of the grassums, so taken by way of action, so as little can he claim the whole or part of such grassums by way of exception or defence against this process, which concludes for payment of a sum laid out by Sir Francis, and for
 I “ which

“ which he obtained a decree *in foro* before this Court, against the
 “ defender, and others ; therefore decerns for the sums libelled.”

Upon advising a reclaiming petition and answers, it was

Observed on the Bench: When the taking of grassums is not prohibited by the entail, the succeeding heir has no claim on their account. It may often happen, that the succeeding heir of entail may reap no benefit from improvements, with the expence of which, however, he is burdened. One of the Judges thought, that there could be no doubt as to the right of taking grassums, but that the act could not be so construed as to make the succeeding heir a loser by the improvement of his estate, and that therefore no claim ought to lie against the defender, till the expiry of the current leases.

The Court (28th November 1792) adhered to the interlocutor of the Lord Ordinary, decerning for the sums libelled, but remitted to his Lordship to adjust the interlocutor, according to the 16th section of the statute, that is, to allow the heir, instead of paying the money, to assign a third part of the free rents of the estate during his life, or till payment.

A reclaiming petition was followed with answers. In these papers, little was said on the general point above stated. But the defender had brought a reduction of the decree in favour of his father, on the head of minority and lesion, which the Lord Ordinary had conjoined with the process at the instance of the trustees, and various objections to the decree were now stated. In particular, it was objected, that Sir Francis, in the notice given to the succeeding heir of entail, instead of specifying the kind of improvement intended, as required by the 11th section of the statute, had contented himself with saying, that he meant to improve the farms of A, B, and C, “ by planting, draining, and inclosing.”

The Court thought the information given was sufficient to put the heirs of entail on their guard, and that no further specification was necessary. The other objections may be sufficiently understood from the interlocutor of the Court, “ Finding the respondents
 “ (trustees) not entitled to charge money laid out in repairing
 “ farm-houses or building lime-kilns, nor for building-houses or
 “ out-houses, which were not mentioned in the previous notices
 “ given to the heirs of entail, in terms of the statute, nor for build-
 “ ings or improvements executed within three months subsequent
 “ to the said notices, and with these variations, adhering to their
 “ interlocutor reclaimed against.”

Lord Ordinary, *Dregborn.*
 Clerk, *Hme.*

Agt. Lord Advocate, *Wight.*

Alt. Tait.

D. D.

N° XVII.

January 22. 1793.

ALEXANDER ALISON,

A G A I N S T

The TRUSTEES of the Earl of Dundonald.

TRUST.—*The trustees in a family-settlement may pay to the creditor primo venienti, till interpellated by legal diligence, and need not bring a multiple-poining.*

THOMAS Earl of Dundonald conveyed his whole estate, real and personal, to trustees, for the purpose of paying his debts and providing for his family.

The Earl died in 1778. The trustees some time after took in-festment on the deed, and acted under the belief that his subjects, if sold to advantage, would be sufficient for fulfilling all the purposes of the trust.

In order to pay the interest of the debts, and extinguish those which were most pressing, they borrowed near L. 3000, on their own personal security. Of that sum, only L. 325 was borrowed after February 1782.

Among other debts, the Earl owed L. 1000 to a society called the Excise Corporation, for which Mr Alison is cashier.

During the years 1779, 1780 and 1781, (and even before the trustees borrowed any money), Mr Alison repeatedly demanded, not only the arrears of interest, which the trustees paid, but the principal sum, unless some additional security were given; but he did not constitute the debt against them till February 1782. And in December 1782, he led an adjudication against the estate, in which the trustees were called as defenders, and afterwards brought a process of ranking and sale.

The lands were sold, and contrary to expectation the funds turned out to be insufficient to pay the debts of the Earl.

In the ranking, the trustees claimed to be preferred to Mr Alison, for the sums they had borrowed and applied to extinction of the Earl's debts, and

Pleaded: It is the duty of a trustee for creditors to bring them all into the field, by a multiple-poining, and he cannot prefer one creditor to another, his appointment creating a strong presumption that the truster is insolvent.

But the trustee in a family-settlement is in a different situation. It is his duty to manage the affairs of his deceased friend *bona fide*,
and

and in a rational manner; like him, while not interpellated by legal diligence, he may reduce effects into money, and discharge demands as they occur. Were it otherwise, no person would undertake an office of that nature; 8th February 1710, Rankine against Johnston, Fountainhall.

The trustees in the present case acted *optima fide*; and as they might have sold the subjects to make the payments objected to, they must be indemnified for the obligations undertaken to prevent a sale at a disadvantage, nor are they obliged to denude till they are so.

Answered: When the trustees borrowed the money for which they are now demanding a preference, they were not ignorant of the existence of this debt, and that payment of it had been demanded. The trust gives them no powers, nor were they in *bona fide* to prefer one creditor to another. They can be in no better situation than the creditors to whom they have made payment; and having done no diligence, they must be postponed.

The Lord Ordinary had preferred the trustees only for payments made in discharging interest upon the whole debts prior to the sequestration, to the extent of the rents, and in discharging certain privileged debts, but not for the money expended in extinguishing the personal debts of the Earl. But, upon advising a reclaiming petition, with answers, the Court (5th December 1792) approved of the order of ranking produced by the common agent, according to which they were preferred even for the latter.

And upon advising a second reclaiming petition and answers, it was

Observed on the Bench: The trustees in a family-settlement need not raise a multiple-poining, but, like the heir, may pay *primo venienti*, until legally interpellated.

The Lords “ adhered.”

Lord Ordinary, *Monboddo*.

For the Trustees, *George Fergusson*.

For Mr Alison, *G. Buchan-Hepburn*.

Clerk, *Menzies*.

D. D.

N° XVIII.

January 25. 1793.

MARION KILPATRICK,

A G A I N S T

JOHN MACALPINE.

SOLIDUM ET PRO RATA.—TUTOR AND PUPIL.—*A tutor named by a grandfather, who neglects to make up inventories, is liable in solidum, although appointed by the same deed trustee over the pupil's estate.*

JAMES KILPATRICK appointed John Macalpine, John Eadie, and others, to be tutors and curators to Marion Kilpatrick, his grand-daughter. By the same deed, he named them his executors and trustees over the whole subjects she enjoyed from him, and declared, “that they should not be liable *in solidum*, nor each for the “other, but each only for his own actual intromissions.” Macalpine and Eadie accepted of these offices, but they made up no inventories of Kilpatrick's estate. Macalpine intromitted with some part of his effects; but the chief management devolved on Eadie, who afterwards became bankrupt, deeply in debt to his pupil.

When Marion Kilpatrick came of age, she brought an action of count and reckoning against her tutors, concluding, that they should be found liable *singuli in solidum*, because they had neglected to make inventories of the subjects under their management. Appearance was only made for Macalpine, who, in defence,

Pleaded: The defender acted not as tutor, but trustee for Marion Kilpatrick. Had another been appointed trustee, the defender could not, as tutor, have interfered with the management of her estate. In fact, she had no effects of which *qua* tutor he could make an inventory. Her sole right in the estate of her grandfather consisted in the faculty of forcing the trustees to denude in her favour. The acts 1672, c. 2. and 1696, c. 8. are therefore not applicable to the present case. And at common law, neither tutors, nor joint administrators of any sort, are liable further than for their own intromissions; Dict. vol. ii. p. 382. 383.

Answered: That tutors, even when appointed by the father, in terms of the act 1696, c. 8. are, if they neglect to make up inventories, liable *singuli in solidum*, was the unanimous judgment of the Court in the case, 10th July 1788, Henderson against Duff and others. A father may often find it convenient to vest the tutors of his children with the additional character of executors or trustees. And this mark of confidence, so far from diminishing, ought rather to increase their obligation to a faithful discharge of their duty. Ac-

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cordingly,

cordingly, in a case not collected, 10th March 1790, Hawkins against Hamiltons, it was found, that a person who had been nominated by a father, both tutor and executor to his child, by neglecting to make an inventory, subjected himself to the penalties of the act 1672. The contrary doctrine would indeed operate as a virtual repeal of the acts 1672 and 1696.

Besides, it is the opinion of Mr Erskine, b. 1. tit. 7. § 27. in which he is supported by several other writers on the subject, and the decisions quoted by him, That even at common law, tutors are liable *singuli in solidum*.

The Lord Ordinary reported the cause on informations.

One of the Judges seemed inclined to find the defender liable only for his own intromissions, on the presumption of his having managed the estate merely in the character of trustee. He thought that in a case where no fraud was alleged, a severe interpretation of the statutes might be dangerous, by deterring many from accepting of gratuitous offices of this nature.

The Court, however, were of opinion, That there was great negligence in the conduct of the defender, and that the point was already in a great measure settled by the decision, Hawkins against Hamilton. They also thought it would be attended with bad consequences, to relax in any degree the salutary regulations of the statutes 1672 and 1696. They therefore

Repelled the defences.

Lord Reporter, Dregborn.

A&C. Cullen.

Alt. Dⁿ of Faculty.

Clerk, Sinclair.

R. D.

N° XIX.

January 29. 1793.

JANET MACDONALD, and JOHN DUFF, her husband, for his Interest,

A G A I N S T

D A V I D D O I G.

HUSBAND AND WIFE.—*Effect of a general renunciation of the jus mariti. Every thing in the wife's possession, except her paraphernalia, is presumed to belong to the husband, till the contrary is proved; even although a few years before he had obtained a decree of cessio bonorum.*

JOHN DUFF, in 1787, obtained a decree of *cessio bonorum*. In this action David Doig was called, among his other creditors.

Near

Near two years after, Duff married Janet Macdonald. In an antenuptial marriage-contract, proceeding on the narrative of her being possessed of personal effects at least to the extent of L. 200, he renounced his *jus mariti*; and she conveyed to trustees the whole property which she then possessed, or should afterwards acquire, without inventory or specification; but the trustees never took any possession.

Duff and his wife have ever since their marriage kept an alehouse.

In March 1791, David Doig sent a messenger to poind his household-furniture. The messenger, on going to the house, was told that the furniture belonged to Janet Macdonald; and, on his insisting to proceed in executing the diligence, she paid him, under protest, L. 5: 7: 6, being the amount of the debt and expences. But she afterwards brought an action for repetition of that sum, and for damages. The defender

Pleaded: It is no doubt true that a marriage-contract may be so framed as to exclude the husband's *jus mariti* over the personal property of the wife; 23d June 1730, Walker, Dict. *voce* Husband and Wife; 5th February 1745, Dalrymple against Murray, Falc. Kilk. But it would be dangerous to give that effect to a contract like the present, where no inventory of the property conveyed was made up, and where consequently it might be made a cover for secreting the effects of the husband to any amount, and for any length of time, even where the wife had never had any property of her own.

At any rate, every thing in the wife's possession, and the money paid by her in the present case, must be presumed to belong to the husband till the contrary is proved. A presumption which is not removed by Duff having formerly been bankrupt.

Answered: If to exclude the diligence of her husband's creditors, it were necessary that the marriage-contract should specify every article of the wife's property, no person in Janet Macdonald's situation in life could ever enjoy that benefit. Her property consisting of her stock in trade, as keeper of an alehouse, and a few articles of household-furniture, being constantly liable to alteration.

The general terms of the contract create no suspicion of an intention to defraud in this case; where, on the one hand, the contract affords evidence that the wife had property; and, on the other, the husband having so recently obtained a *cessio bonorum*, renders it improbable that he can have any; unless he has fraudulently secreted it from his creditors, which is not to be presumed. And if the poinding attempted was illegal, the extorting money, in order to prevent it, must be equally so; 20th February 1782, Henderson against Buddo.

The Lord Ordinary had sustained the claim to the extent of repetition of the money, and expences of process.

This interlocutor having been brought under review, by a reclaiming petition and answers, the Court, on the 4th December 1792, adhered, "in respect no proof was offered by either party."

But upon advising a second reclaiming petition and answers, it was

Observed on the Bench: That the former interlocutor would have been attended with very dangerous consequences. Some Judges seemed to think, that a specification of the subjects in an inventory was absolutely necessary to make a contract of this nature effectual; for that although an actual and visible estate belonging to the wife might by an antenuptial contract be secured against the husband's *jus mariti*, a general stipulation that so much money should belong to her, would be liable to much abuse. But all agreed, that every thing in the possession of the wife must be presumed to be the husband's till the contrary was established, and that this presumption was not removed by his having formerly obtained a decree of *cessio bonorum*.

The Lords assilzied the defender, and found the pursuer liable in expences.

Lord Ordinary, *Dregborn.*
Alt. *John Dickson.*

A& *William Robertson, Cba. Hope.*
Clerk, *Menniss.*

D. D.

N° XX.

January 31. 1793.

Mrs ELIZABETH ROSS,

A G A I N S T

The TRUSTEES of Hugh Ross.

HERITABLE and MOVEABLE.—*When an adjudication is led on a moveable debt by a factor loco tutoris, the debt remains moveable as to succession.*

HUGH Ross died in London in the year 1775, leaving a widow and two sons, Hugh and Andrew-William. Hugh the eldest succeeded to the whole of his father's landed property. As a provision for Andrew-William, his father granted a bond for L. 10,000 to certain trustees, for his behoof, payable at his majority.

Mr Ross left his affairs in considerable disorder, and his eldest son having contracted large debts, the trustees of Andrew-William in 1776 thought it necessary to raise an inhibition against him.

Andrew-William attained the age of majority in 1777; but having soon after become insane, the Court of Session named a factor *loco tutoris*, to take charge of his interest.

In 1786, the creditors of Hugh Rofs the son brought an action of ranking and sale of his whole landed property. And in 1789, the factor *loco tutoris* of Andrew-William obtained an adjudication over it, in security of the sums contained in the above mentioned bond of provision.

Andrew-William died in 1791, leaving no issue.

Hugh Rofs served heir in general to his brother, and on that title executed a conveyance of the bond of provision and adjudication in favour of certain trustees, for behoof of himself and his creditors.

These trustees applied for an interim warrant for L. 10,000 on the purchasers of part of Hugh's landed property, to account of this debt.

Elizabeth Rofs, the mother of Andrew-William, opposed this warrant, on the ground, that notwithstanding the adjudication, the provision still continued moveable as to succession, and that as Andrew-William had his domicil in England, the division of his executry must be regulated by the law of that country, by which she was entitled to an equal share with his surviving brother, in terms of the statute 1 James II. c. 17. In support of her claim, it was

Phaded: A creditor having the free administration of his own affairs, who leads an adjudication upon a personal debt, if he does not guard against it by proper deeds, must be presumed to have intended an alteration in the course of his succession. But when the adjudication is led by those acting for a person disabled by non-age or fatuity, from disposing of his property, there is no room for this presumption. Hence it is fixed, that no deed of a guardian can affect the succession of his ward; Bankt. vol. i. p. 169. ; Fount. 12th July 1688, against

It is true, indeed, that in this case from Fountainhall, the alteration in the state of the pupil's property arose from the tutor's voluntary act, whereas, in the present case, the adjudication was necessary, in order to secure the debt. But whether the deed be voluntary or necessary, seems unimportant, as the general principle applies equally to both.

2dly, Even if a proper tutor could, by leading an adjudication, alter the line of his pupil's succession, an adjudication led by a factor *loco tutoris* can have no such effect. It is clear, from the preamble of the act of sederunt 13th February 1730, under which such factors are appointed, that their whole duty consists in *preserving* the estate entrusted to their management. No step, therefore, taken with this view, should alter the course of its succession. Besides, when a tutor adjudges the estate of his pupil, the adjudication is led in the pupil's name; but here the adjudication went out in the name of the factor; so that the interest of Andrew-William Rofs, at his death, had resolved into a personal claim against the factor, which must of course descend to his executors.

3tio, It is not in consequence of the adjudication, but of the inhibition in 1776, that any part of the debt is recovered. The interests produced for prior adjudgers exhaust the whole price of the

the estates in Scotland. But an inhibition neither alters the nature of the debt nor its course of succession.

Answered : 1st, It is not the presumed will of the proprietor, but the nature of the subject which regulates, whether as heritable it shall descend to the heir, or, as moveable, go to the nearest in kin; nay, it often devolves in direct opposition to his intention. In the case of Ross against Ross *, in 1770, sums secured by adjudication went to the heir at law against the *enixa voluntas* of the deceased. See also Waddell against Colt, 13th February 1789. Upon this principle, testamentary deeds, bequeathing heritage, and dispositions on deathbed, are ineffectual against the heir. For the same reason it is not the citation in an action of adjudication, although it is then that the creditor shows his intention of altering the nature of the debt, but the decree pronounced upon it, which renders a personal debt heritable; Ersk. b. 2. tit. 2. § 14. And, on the other hand, the mere *intention* of the proprietor to convert his heritable into moveable property, does not make it lose its heritable quality; 12th November 1728, Reids against Campbell, stated in Dict. vol. i. p. 374.; President Falconer, 17th January 1683, Wishart against the Earl of Northesk. The right to a debt may even descend partly to the heir, and partly to the executor, although it is impossible to suppose, that the predecessor intended such a destination; Kilk. p. 245. 13th June 1748, Sir William Dunbar against the Executors of Brodie.

Even the voluntary acts of a tutor affect the pupil's succession; Stair, b. 1. tit. 6. § 36.; Erskine, b. 1. tit. 7. § 18.; Bankton, b. 1. tit. 7. § 29. and 36.; Harc. p. 296. 19th July 1671, Sharp against Crichton. And that his necessary acts, such as the present, have that effect, has never before been disputed.

2^d, A factor *loco tutoris* has nearly the same powers with a tutor; Kilkerran, 13th January 1747, Robina Pollock, 17th June 1758, Brown against Scouler. What is said of the adjudication vesting in the factor *loco tutoris*, and not in the pupil, is impossible; for then it would follow, that the debt could exist in the one, and the adjudication for the debt in the other. But even if the debt and the adjudication could be thus separated, it would not avail the objector; for a personal right attached to an heritable subject, is equally heritable with the subject itself. The factor held the subject in trust, and the claim against him was to denude.

3^d, It was solely in virtue of the adjudication that a security was created over the estate, by which the debt can be recovered. The inhibition had merely the negative effect of annulling posterior rights; Erskine, b. 2. tit. 11. § 13.

The Court were of opinion, that there was no difference between an adjudication led by a factor *loco tutoris* and a proper tutor. And a great majority thought, that although both might better the security of the pupil, by converting his moveable estate into heritable, yet no deed of either could alter the line of his succession.

* Not yet collected.

cession. It was further observed, that the circumstance of a subject heritably secured going to the nearest in kin, was not at all adverse to the analogy of our law in other cases. It was upon the same principle, that requisition used by a creditor upon an infestment of annualrent made the sum in the right moveable, although the infestment remained.

One of the Judges wished to make a distinction between the voluntary and necessary acts of a tutor, and to consider the latter as having in all respects the same effect with those of the proprietor himself. But it was suggested, that this would leave the matter on too loose a footing, and involve parties in a proof of the necessity of altering the security in every particular question.

The Court found, "That the debt in question was moveable in regard to succession."

A reclaiming petition against this interlocutor was refused, without answers.

Lord Reporter, *Swinton.*
Alt. *Honyman et alii.*

For Mrs Ross, *Wight, M. Ross.*
Clerk, *Sinclair.*

R. D.

N° XXI.

February 1. 1793.

HENRY PEIRSE, and others,

AGAINST

Mrs ELIZABETH ROSS.

INHIBITION.—An inhibition against a person out of Scotland, is effectual against all his lands within the kingdom, if published at the market-crofs of Edinburgh, and pier and shore of Leith.

HUGH ROSS was proprietor of certain lands lying in the shires of Ayr and Ross, which were brought to judicial sale.

In the ranking of his creditors, Elizabeth Ross produced as her interest, a claim secured by an inhibition which was executed against Hugh Ross, as forth of the kingdom, at the market-crofs of Edinburgh, pier and shore of Leith, and was published against the lieges both there and at the market-crofs of Ayr, the head burgh of the county where he generally resided when in Scotland. It

was regularly recorded, with all these executions, in the general register at Edinburgh.

To this inhibition Henry Pierse and other creditors of Hugh Rofs

Objected: That as it had not been published at the head burgh of the shire of Rofs, it could not be effectual as to the lands belonging to the common debtor in that county. The object of publication is to give warning to the lieges (who are always presumed to be within the kingdom) of the debtor's situation; it must be made therefore at the head burgh of the county where the debtor resides; and if he is out of the kingdom, at the head burgh of every county in which his property is situated; 9th June 1752, Blackwood against the Creditors of Hamilton.

Answered: If the debtor is within Scotland, it is sufficient that an inhibition be published at the market-cross of the head burgh of the county where he resides, in order to be effectual against his heritage wherever situated; and if he is out of the kingdom, it is only necessary for this purpose, that it should be published at the market-cross of Edinburgh, as the *commune forum*, and at the pier and shore of Leith. The publication at the market-cross of Ayr, in the present case, was merely used *ob majorem cautelam*. If publication at the market-crosses of the head burghs of every shire where the lands lie, were required, no inhibition could be depended upon, with respect to the debtor's subsequent acquisitions, unless it were published at the market-cross of the head burgh of every county in Scotland; Stair, b. 4. tit. 50. § 10.; Macdowall, b. 1. tit. 7. § 136.; Erskine, b. 2. tit. 11. § 6.

The Court, upon the ground stated for Mrs Rofs, "Repelled the objection."

Lord Ordinary, Swinton.
Clerk, Sinclair.

Ast. Rolland, Swinton.

Alt. Wight.

R. D.

N° XXII.

February 1. 1793.

The CREDITORS of James Stein,

A G A I N S T

NEWNHAM, EVERETT and Company.

RIGHT IN SECURITY.—*An indefinite security cannot be created on an heritable bond.*

JAMES STEIN conveyed to Newnham, Everett and Company, an heritable bond for L. 12,000, secured by infeftment, as a corroborative security for the sums which they should advance on a cash-account to Buchanan and Company, with whom Stein was connected in business.

The conveyance was silent as to the extent of the sum for which the bond was pledged.

Newnham, Everett and Company took infeftment on this conveyance, and both before and after doing so, they made large advances to Buchanan and Company. In a reduction, at the instance of Stein's creditors, the Court, on the 14th November 1789, and afterwards the House of Lords, found, that the infeftment could have no effect as to sums advanced posterior to its date.

A doubt having been started when the last interlocutor was pronounced, how far the conveyance was effectual at common law, even for sums advanced prior to the infeftment, the creditors now shaped their objection accordingly, and

Pleaded: The proprietor of a moveable subject may lawfully impignorate it for a future as well as for a present debt, for a debt of indefinite as well as one of a definite extent, and the delivery of the subject completes the right of the creditor.

But as in heritable property actual delivery is impossible, if a private agreement between the parties were sufficient to constitute a burden on it, there would be no way by which a previous incumbrance could be discovered. To supply this defect, heritable bonds, and other rights in security were introduced, which are not effectual till an infeftment taken on them has been recorded; and the records would but ill answer the purpose intended, if it were not essential to such rights, that they should express the name of the creditor, and the nature and *extent* of the debt. Hence, although this principle was little attended to in the older practice of the Court, it is now completely established, that no indefinite burden can exist upon land; Dict. vol. ii. p. 66, 67. 1734, Creditors of Maclellan*; 30th June 1739, Creditors of Broughton against Gordon; Kilk. 21st February 1765, Stenhouse against Innes and Black. The

M

conveyance

* Not collected.

conveyance in question, therefore, as being clearly of that description, must be reduced.

Answered : There is a material distinction between the case where an indefinite burden is imposed on *land*, and to which all the cases quoted relate, and the present, where it is to be imposed on an heritable *bond* already secured upon land. As the value of land is indefinite, the extent of the burden in the former cannot be discovered from the records. But the value of the bond is definite, and if conveyed without limitation, it must be presumed to be burdened to the utmost extent, in the same manner as if it had been so expressed in the conveyance. The records thus ascertain both the extent of the burden chargeable on the lands, and the amount of the debt for which the bond is impignorated.

The possession of an heritable as well as that of a personal bond, may be transferred to a creditor, and unless in so far as the holder is restrained by the act 1696, there seems no good reason why both may not be impignorated with the same freedom.

The Lord Ordinary reported the cause on informations. .

Observed on the Bench : It has long been established, that no indefinite burden on land can be supported. There is no room for distinguishing between a landed estate and an heritable bond ; both are held by feudal tenures, and the burdens on both ought to be public. Although the bond assigned is definite, the security created on it is indefinite.

The Lords pronounced the following interlocutor : “ Find the conveyance granted by James Stein of the heritable bond granted by Robert to James Stein, over the lands of Kincaple, belonging to Robert, was an indefinite security, and therefore cannot be sustained, so as to create a preference to Messrs Newnham, Everett and Company, in a question with the other creditors of James Stein ; and therefore reduce, decern ; and declare accordingly ; repel the claim made by Messrs Newnham, Everett and Company for the expences disbursed by them in this cause previous to the agitating the point now under consideration, and find expences due to neither party *.”

Lord Ordinary, Swinton.
Alt. Wight, Hay.

Act. Dean of Faculty, Macnochie.
Clerk, Sir James Colquhoun.

D. D.

N° XXIII.

* The defenders contended, that the pursuers plea was incompetent, because the final interlocutor of the Court, authorising a partial reduction only in an action where a total was sought, implied that *quoad ultra* the defence was well founded, and, at any rate, that they must be entitled to the expence of the previous litigation. The Court were not moved by this objection. There is nothing, it was observed, to hinder a pursuer from insisting separately on different grounds of reduction.

N° XXIII.

February 7. 1793.

JAMES HENDERSON,

AGAINST

WILLIAM SCOTT.

WRONGOUS IMPRISONMENT.—*Act 1701, c. 6.—A person in suspicious circumstances may be imprisoned, though no information has been lodged that the crime of which he is suspected has been committed.*

PUBLIC OFFICER.—*Favourable situation of a public officer, acting bona fide in the discharge of his duty.*

ON the 13th November 1788, a reputable jeweller in Edinburgh sent information to the office of the Sheriff-clerk, that a valuable diamond-ring had been left at his shop by James Henderson, a person of a mean appearance, who might be suspected of having got it by dishonest means, and who had promised to return at a certain hour, to get his opinion of its value. Henderson was in consequence apprehended, and brought before the Sheriff, when being examined, he declared, that on his return from London, where he had been for some time a menial servant, having occasion to stay some days at Berwick, he bought the ring there for 7s. 6d. from a glazier's apprentice, whose Christian name was Thomas, but whose surname was unknown to him. He was confirmed in this account of the matter by another person who had been present at the purchase.

Mr Scott the procurator-fiscal suspecting the truth of this story, applied for a warrant of commitment, which was obtained, and put in execution. On the same day he wrote to the Mayor of Berwick, making inquiries concerning Henderson's story. By return of post, he received an answer, by which it appeared, that Henderson had told the truth, and he was in consequence immediately liberated.

Henderson then commenced an action of wrongous imprisonment, oppression and damages, in which he called as defenders the Sheriff-substitute, the gaoler, and Mr Scott, and founded both on the common law and the act 1701. But at an early stage of the process he consented, that the jailor should be assilzied, and limited his conclusions against the other defenders to a claim of damages at common law, in which he

Pleaded: A Magistrate is not warranted to grant, nor a public officer to apply for an order to apprehend, and still less an order to incarcerate, for a criminal cause, without previous knowledge, or at least credible information of a particular offence having been committed.

committed. Where this has been obtained, the officer of police must indeed be allowed a considerable latitude in proceeding against whatsoever person, any, even slight, if probable grounds of suspicion fall; and if in this way an innocent person shall suffer confinement, it is an injury which must be submitted to for the sake of the general safety. But he cannot be allowed to infer from circumstances, though seemingly unaccountable, both the *corpus delicti* itself, (of which no intelligence has been got), and the guilt of the suspected person. In this case a few days were sufficient to vindicate the pursuer from suspicion; but the same principle, had a much longer delay been necessary, would have justified a similar conduct. This distinction, which is not contradicted by any authority in the law of Scotland, is completely established by the law of England. Blackst. b. 4. chap. 21. § 1.

At any rate, an innocent person imprisoned in such circumstances, should recover the actual loss sustained by him.

Answered: A Magistrate may imprison on suspicion of an intention to commit a crime. A constable may detain a suspicious person till he is examined by a Magistrate. A private person may do the same thing when he sees people quarrelling, or using threatening expressions to each other; and surely the detection of a crime, which may, and is on likely grounds believed to have happened, is as important to society as the prevention of a crime which may possibly be committed.

Yet the unavoidable consequence of the pursuer's doctrine would be to allow the most notorious thief or robber, however incredible his story, or suspicious his situation, to dispose of his goods with impunity, provided he could outrun the news of his guilt.

As there are scarcely any systematic authors on the criminal law of Scotland, no direct authority can be adduced in support of what has been said; but it may be inferred from Mackenzie, from the act 1661, chap. 38. and from the act 1701, which relates chiefly to commitment for trial, and not to commitment for examination and inquiry, as in the present case; and it is ascertained by daily practice both in this country, and in England, whatever may be the theory in the latter kingdom.

Replied: Greater latitude may frequently be allowed for the prevention than for the detection of crimes; to prevent a murder, than to detect the person guilty of it; to prevent a riot, by which the lives of thousands may be endangered, than to detect the rioters after the quiet of the country is restored.

The statute 1661, chap. 38. introduces certain exceptions to the general rule, and is in other respects a confirmation of it.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: The act 1701 is inapplicable. When the information on which a warrant is granted is calumnious, the only remedy is an action of oppression and damages at common law;

but here the conduct of the defenders was completely justified by the circumstances of the case and daily practice.

A second branch of the pursuer's claim it may be sufficient barely to mention. By a second letter from the Mayor of Berwick, received a few days after the former, Mr Scott was informed, that the ring in dispute had been found upon the Calf-hill, which is situated about a quarter of a mile north from Berwick on the Scotch road. On this information Mr Scott kept the ring, both in order to discover the real owner, and because, as a waif, it belonged to the Crown. The pursuer presented two petitions to the Sheriff to have it restored, which being refused, he complained by bill of advocacy. A proof was allowed, from which it appeared, that the Calf-hill was within the territory of the town of Berwick. The right to the ring was therefore to be regulated by the law of England, by which waifs belong to the finder. The ring was accordingly restored. The pursuer claimed from Mr Scott damages for its being so long withheld, and the expence of recovering it.*

Observed on the Bench : Perhaps Mr Scott ought to have restored the ring after keeping it a year. But there being this material difference between the situation of a public officer and an individual, that the former is obliged in duty to interfere, while the latter is not, it would be dangerous to subject him to damages, when he acted *bona fide*, and without any view to his own interest, as he could not have been the King's donatory.

The Court unanimously "sustained the defences, and found no ground for damages" on either conclusion of this action. And by a narrow majority, chiefly because there was no fund from which Mr Scott could be indemnified, they found the pursuer not entitled to the expence of the former litigation.

Lord Reporter, *Eskgrove.*

A&C. Dean of Faculty, *D. Douglas.*

Alt. Lord Advocate, *Chas. Hope.*

Clerk, *Mitchelson.*

D. D.

* The process for recovery of the ring had been remitted to the action of damages, in order to obtain a judgment of the Court on the article of expences.

N° XXIV.

February 8. 1793.

The MINISTER of the Parish of Falkland,

A G A I N S T

DAVID JOHNSTONE, and others.

GLEBE.—*When a minister is deprived of his manse and glebe, by a contract, which is saved from reduction by a prescriptive title, he is nevertheless entitled to a new designation.*

IN the year 1650, a contract was made between the minister of Falkland and the titular of that parish, whereby the former with consent of the presbytery, gave up his manse and glebe, and in lieu thereof accepted of the annual payment of a chalder of bear out of the teinds.

Mr Brown, the present incumbent, brought a reduction of this transaction against the present possessor of the glebe; but he having founded his defence on a prescriptive title sufficient to exclude, was assolizied.

Upon this the minister applied to the presbytery, to design him a new manse and glebe, which they did accordingly; and he then renounced all claim to the chalder of bear.

The sentence of the presbytery was brought under review by some of the heritors, who

Pleaded: The contract 1650, until it be legally set aside, is binding upon Mr Brown and all future incumbents. The presbytery have no right to judge of its validity, which, however, they have virtually done, by their proceedings in this case.

2dly, The present possessor of the old glebe has acquired a prescriptive right to it. The heritors ought not to suffer from the negligence of the ministers, in delaying so long to challenge the contract. The pursuer therefore cannot claim a new designation; Edgar, 10th June 1724, Minister of Stoniekirk against Maxwell.

3dly, The contract is homologated by constant observance for nearly a century and a half, on the part of Mr Brown and his predecessors.

Answered: As it has been found, that the old glebe cannot be recovered, a decree of reduction of the contract would be altogether inept.

2dly, The contract was undoubtedly illegal; 1572, c. 48. 14th May 1791, Minister of Little Dunkeld. The right of bringing it under reduction was not confined to succeeding incumbents. The

heritors themselves had a title to pursue, and therefore it is more reasonable that they should suffer from their having omitted to do so, than that the present incumbent should be injured by an illegal transaction, with which he had no concern. If it were held, that an incumbent is tied down by the culpable omissions of his predecessors, all the enactments of the Legislature, guarding against the dilapidation of benefices, would be frustrated.

3dly, The taking benefit of a reducible right, while it subsists, does not infer homologation; 27th February 1688, Chalmers against Wood; 12th March 1684, Archbishop of St Andrew's against Bethune, stated in the Dictionary, *voce* Homologation, p. 382. It therefore ought not, *ex paritate rationis*, to bar a minister from applying for a new designation, his only mode of redress, when precluded by prescription from recovering the *ipsum corpus* of the glebe which has been dilapidated.

The Lord Ordinary sustained the defences of the heritors.

On advising a reclaiming petition, with answers, it was

Observed on the Bench: Every clergyman must reside within his parish, and every minister of a landward parish is entitled to manse and glebe, beside a suitable provision out of the teinds. The transaction 1650 was therefore unlawful, and the minister is of consequence entitled to another manse and glebe.

The Court unanimously altered the interlocutor of the Lord Ordinary, and found, that "the petitioner, notwithstanding of the contract 1650, is entitled to a manse and glebe, in the ordinary course of law."

Lord Ordinary, *Alva*:

For the Heritors, *Wight*.

For the Minister, *W. Robertson*.

Clerk, *Sinclair*.

R. D.

N° XXV.

N° XXV.

February 9. 1793.

The CREDITORS of John Newlands,

A G A I N S T

A N D R E W M A C K E N Z I E.

HYPOTHEC.—*An agent ordained to make exhibition to his client's creditors, of his title-deeds, on getting a decree of preference for his account, on the produce of the subjects, and a warrant for payment out of the first and readiest of the funds in medio.*

JOHAN NEWLANDS owed Andrew Mackenzie, writer to the Signet, an account for business performed. His creditors demanded exhibition or inspection of certain title-deeds belonging to him, in Mr Mackenzie's possession, which he refused, till he got payment of his account.

The creditors had no objection that Mr Mackenzie's preference on the funds of the debtor should be ascertained by a decree of the Court, but insisted, that they should have inspection of the title-deeds.

Mr Mackenzie

Objected: A third party may no doubt call for exhibition of writings *in modum probationis*, although subject to the writer's hypothec, without paying his account; Dictionary, vol. i. p. 419.: But this is not competent to the employer, or to creditors standing merely in his right; Kilkerran, *voce* Hypothec, No. 7. Wallace; 23d January 1773, Finlay against Syme; 9th August 1781, Ranking of Provenhall.

From the peculiar situation of the property of Mr Newlands, there is reason to believe, that the creditors will not find it their interest to sell it, so that the hypothec will thus be completely disappointed.

Answered: The decisions above quoted proceeded on specialties. If the title-deeds are not produced, the subjects must remain unfold, and the account unpaid. If they are produced, and the subjects sold, the objector will get payment; if they are not, he can suffer nothing by the production.

The Lord Ordinary ordered the writings called for to be produced, reserving to Mr Mackenzie his right of hypothec.

The Court, upon advising a reclaiming petition and answers, "remitted to the Lord Abercromby to ascertain the amount of the petitioner's account; and upon the petitioner's lodging in the clerk's hands the papers in question, found him entitled to

“ a warrant upon the factor, for the amount of the account, when
 “ so ascertained, out of the funds received or to be received by
 “ him out of the subject *in medio*, and remitted to the Lord Aber-
 “ cromby Ordinary to proceed accordingly.”

Lord Ordinary, *Abercromby*.
 Alt. *Charles Hope*.

For Mr Mackenzie, *G. Fergusson, Cha. Hay*.
 Clerk, *Sinclair*.

D. D.

N^o XXVI.

February 9. 1793.

JOHN SIME and his ATTORNEYS,

A G A I N S T

The CHILDREN of George Simpson.

WITNESS.—*Objection to a witness that he is a party in the process, as attorney for the pursuer, found to be removed by his obtaining a bond relieving him from the consequences of the action.*

GEORGE SIMPSON having purchased some houses from the Earl of Findlater, John Sime, his son-in-law, advanced him L. 200, to enable him to pay the price, for which George Simpson granted a missive, obliging himself to give an heritable security over the subjects, as soon as his titles to them should be made up. William Reid, town-clerk of Banff, who wrote the missive, and the Earl's factor, seem to have been the only persons except Simpson's own family who knew any thing of this transaction. Soon after the missive was granted, John Sime went abroad, and left with Mr Reid the charge of getting his heritable security made out.

George Simpson died without granting the heritable security, and Sime, wishing to recover his money, named Reid and others his attorneys, who brought an action against the children of George Simpson, as representing their father.

The original missive was in the possession of one of the defenders, who said she had found it among her father's papers, and contended, that it had either never been delivered, or had been given up upon payment. Sime, on the other hand, alleged, that she held it, as depositary for him.

A proof having been allowed, the pursuers proposed to examine Mr Reid. This being opposed, the Lord Ordinary, “ in respect
 “ of his being one of the attorneys for the pursuer, and by that
 “ means materially interested in the issue of the cause, *in hoc statu*
 “ sustained” the objection.

O

Upon

Upon which the agent of the pursuers granted and produced in process an obligation, binding himself and his heirs to free Mr Reid of every claim which might arise against him, in consequence of his being attorney in the action.

The defenders still

Objected: Mr Reid is a pursuer in this action, and is nevertheless insisting that his own oath should be taken; but as his interest in the issue of the cause was originally an unfurmountable objection to his being admitted, (Erskine, b. 4. tit. 2. § 25.; Dict. vol. i. p. 524. v. Witness,) it would be dangerous, in point of precedent to give the bond produced the effect of removing it; Dict. vol. i. p. 526. v. Witness.

Answered: Mr Reid is merely a nominal pursuer. His interest in the issue of the cause, which was at first but contingent and remote, the principal pursuer being undoubtedly solvent, is now entirely done away; Dict. vol. ii. p. 526.

Besides necessary witnesses, like the present, have in many cases been admitted, even where they had a real interest; Dict. vol. ii. p. 524, 525. vol. iii. p. 565.; 12th July 1743, Lindsay against Ramsay, Clerk Home; 19th December 1786, Scott against Caverhill.

The Lord Ordinary allowed Mr Reid to be examined, reserving all objections to his credibility.

Upon advising a reclaiming petition and answers, the Court adhered."

Lord Ordinary, *Justice-Clerk*.
Clerk, *Gordon*.

Act. M. Refs.

Alt. *Honyman*.

D. D.

N° XXVII.

February 13. 1793.

(TEIND COURT.)

Sir THOMAS DUNDAS,

AGAINST

ROBERT BAIKIE, and others.

TEINDS.—*When a joint feu-duty is payable for stock and teind, the portion paid for the latter is free teind.*

THE Earls of Morton, from whom Sir Thomas Dundas derived his right, held the earldom of Orkney and lordship of Shetland, with the teinds belonging to them, by a grant from the Crown in 1643, confirmed by various acts of Parliament.

That family feued out a great part of the lands contained in this grant, for payment of an annual feu-duty for stock and teind, without distinguishing the proportion payable for each.

The minister of St Andrew's and Deerness in Orkney, having got an augmentation of stipend, Sir Thomas Dundas made up a scheme of locality, in which the augmented stipend was allocated, *1st*, On those heritors who had no right to their teinds; and, *2^{dly}*, On those who had acquired right to them by the feu-charters above mentioned.

Mr Baikie and other heritors in this last situation, objected, that the part of the feu-duty payable by them to the titular for their teinds, must be considered as free teind, and allocated *primo loco*, and

Pleaded :—When teinds are let in tack to the heritor, the tack-duty must be exhausted before any further burden can be imposed on him; Erskine, b. 2. tit. 10. § 51. Now there is no room for making a distinction between a tack and a feu of teinds; both give a real right; a tack may be granted for a period equivalent to a perpetuity; 17th November 1763, Wight against Earl of Hopetoun, Dictionary, vol. iii. Tack. And in both there is an irritancy *ob non solutum canonem*, and a yearly payment, which is, or at least in law is supposed to be the full value of the subject.

When a titular is forced to sell his teinds at the rate of six or nine years purchase, it is equitable that he should be freed from, and that the landlord acquiring an heritable right for a price so inadequate, should be burdened with all future augmentations. But if the same rule held where by an extrajudicial transaction the titular gets the yearly value of his teinds, the heritor would be subjected in double payment of them.

This

This objection is supported by 1587, c. 29. which is in full force, in all cases where a process has not been brought upon the subsequent statutes, and by the following authorities, Forbes on Tithes, part 2. c. 6; 11th March 1684, Heritors of Tullialin against Colvill, Fountainhall, vol. i. p. 281.; February 1738, Duke of Douglas against Elliot, Dictionary, Teind, p. 442.; Erskine, b. 2. tit. 10. § 51. 52.

Answered: The titular had an undoubted right to sell the teinds to the heritors, in which case he would receive a price on which no future burden could be imposed, and they would acquire the privilege of drawing their own teinds, which could not afterward be allocated till the free teind was exhausted.

The objectors have by their feu-charters obtained a permanent heritable right to their teinds, very different from the temporary right of a lessee, and for that reason their teinds have been allocated only *secundo loco*.

For these advantages they have given a valuable consideration, and it cannot affect the rights of parties, whether it consisted in a price instantly paid, in a bond payable at a future period, or, as in the present case, in an equivalent annuity payable out of the lands; Erskine, b. 2. tit. 10. § 38. See also Forbes on Tithes, p. 296.

The Lord Ordinary pronounced the following interlocutor: "In respect it is admitted, that part of the duties paid by the heritors of the parish of St Andrew's and Deerness to Sir Thomas Dundas are teind-duties, finds, that these teind-duties are first to be allocated along with the other free teinds of the parish."

The Court "adhered" by two consecutive judgments*.

Lord Ordinary, *Stonefield*.

For the Objectors, *Honyman*.

Alt. *W. Robertson*.

D. D.

N° XXVIII.

* Similar judgments were pronounced in a case of the same kind, occurring between Mr Grahame of Kinross and his vassals.

N° XXVIII.

February 13. 1793.

(TEIND COURT.)

DAVID WILKIE,

AGAINST

The HERITORS of the Parish of Cult.

COMMUNION ELEMENTS.—*The Court cannot award an allowance for them out of the stock.*

IN a process of augmentation brought by Mr Wilkie, minister of the parish of Cult, the Court awarded to him by way of stipend, “the whole teinds, parsonage and vicarage, including there-” in L. 40 Scots for furnishing the communion-elements.”

The pursuer presented a petition, praying that the sum allowed for communion-elements should be increased. The petition was refused, without answers.

A second petition was offered for the same purpose, in which two cases were stated where the Court, after the teinds were exhausted, had burdened the heritors with a sum for communion-elements, payable out of the stock. In answer to this petition, the heritors

Pleaded: The teinds alone are burdened with the expence attending the administration of the sacrament; and indeed the commission of teinds has no authority to pronounce any decree which cannot be made effectual from them; 1572, c. 52.; 1592, c. 123. 166.; 1606, c. 2.; 1617, c. 3.; 1621, c. 5.; 1633, c. 8. 19.; 1661, c. 61.; 1663, c. 28.; 1672, c. 15.; 1686, c. 22.; 1690, c. 30.; 1693, c. 23.; 1707, c. 9.; Stair, b. 4. tit. 1. § 58.; Bankt. b. 2. tit. 8. § 165, 166.; Erskine, b. 1. tit. 5. § 23.; 25th November 1778, Heritors of Glenbucket *; 17th June 1772, Robertson against Lady Frances Erskine.

Observed on the Bench: This Court has no jurisdiction over the stock.

The petition was unanimously refused.

Act. Wm. Robertson.

Alt. R. Graigie.

D. D.

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N° XXIX.

* Not collected.

N° XXIX.

February 19. 1793

WILLIAM MUIR, and others,

A G A I N S T

WILLIAM MACBEAN, and others.

BURGH ROYAL.—*The Magistrates and Town-council of Edinburgh have power to form and regulate societies of porters, chairmen, within the city.*

Disbanded soldiers are not entitled to exercise a plurality of trades.

THE porters of Edinburgh were first formed into a distinct society, by an act of the Town-council, in 1738, by which they are allowed to exact admission-dues, &c. for the benefit of their poor, and are subjected to a variety of regulations, in order to secure their good behaviour. The act declares, "That no person shall be allowed to labour or carry burdens within the city in the character and station of a porter," who does not obey the directions; Maitland's History of Edinburgh, p. 336, 337.

The chairmen form a distinct society, and were put under regulations by the Magistrates in the same year.

The act relating to the porters was rescinded, and new regulations adopted, by an act of Council in 1762, by which it is provided, that no chairman shall be allowed to enter into the society of porters.

In 1777, the Council framed additional regulations for the society; in particular, they prohibited the chairmen from interfering with the business of a porter, under this exception "That they may carry furniture in fitting time, from the 1st of May to the 30th of May, on paying 1 s. 8 d. each every year for the porters box, for the use of the poor."

A similar regulation had been made annually for several years before.

It was declared by these acts, that the society formed by them and the regulations which they introduced, should only continue during pleasure.

In spring 1790, the sum to be paid by the chairmen for the privilege of carrying furniture at fitting time, was by the fit Magistrate increased to 2 s. 6 d.

Certain disbanded soldiers, who had become chairmasters, had refused to pay for this privilege, William Muir, boxmaster to the society, was prosecuted for this refusal.

society of porters, complained to the Magistrates, who gave judgment against the chairmasters.

In a suspension of this decree, the chairmasters

Pleaded : *1mo*, Corporations with exclusive privileges can be formed only by the Legislature or the Crown; Blackst. vol. i. p. 472. and such as have long existed are presumed to have been sanctioned by their authority; Viner. Abr. v. Corporation.

The Magistrates are entitled to make such regulations as are necessary for the police of the city, but they cannot bestow exclusive privileges. The suspenders, therefore, who are willing to submit to the former, cannot be compelled to contribute to the porters box.

2do, Disbanded soldiers are entitled to follow such trades as they are qualified for, without being subjected to corporation-laws.

Answered : *1mo*, The Magistrates of Edinburgh have, by charters from the Crown, and indeed the Magistrates of every great city, from the nature of the thing, must have power to subject those classes of men who ply in the streets for hire within their bounds to such regulations as are necessary to secure to the public the faithful execution of their duty.

The exaction complained of, at least to the extent of 1 s. 8 d. is sanctioned by a decree of this Court in 1776.

2do, The Legislature did not mean that disbanded soldiers should have power to carry on a plurality of trades at one time, but merely that they might exercise any *one* for which they were qualified, without serving an apprenticeship, or paying dues of admission; 24 Geo. III. sess. 2. c. 6.

The Lord Ordinary found the letters orderly proceeded.

Upon advising a reclaiming petition and answers, it was

Observed on the Bench : The Magistrates are clearly entitled to make regulations for the police of the city, subject however to the controul of this Court. Those complained of seem to be very proper. At all events, they can only be set aside in a regular process of reduction. A single Magistrate cannot make such regulations.

Disbanded soldiers cannot follow a plurality of trades. They have no higher privilege in this respect than a member of that corporation, whose trade they exercise.

The Lords found the letters orderly proceeded, to the extent of 1 s. 8 d. against the suspenders respectively.

And

And after advising a second reclaiming petition, with answers,
“ they adhered.”

Lord Ordinary, *Justice-Clerk.*
Clerk, *Sinclair.*

For the Suspenders, *Wilde.*

Alt. *Honyman.*

D. D.

N° XXX.

February 20. 1793.

Messrs PERCHARD and BROCK,

A G A I N S T

JAMES BRACKENRIDGE, and others.

BILL OF EXCHANGE.—*The holder of a bill in security for sums formerly advanced, or to whom a general balance is due, has the same privileges with a holder for value instantly paid.*

PERCHARD and BROCK of London, were the correspondents of Messrs Agnew and Sheppard, merchants in Guernsey. In this character, they were in the practice of paying bills drawn upon them by Agnew and Sheppard, on receiving one half *per cent.* of commission. In consequence of such payments, they were, in the year 1788, above L. 1000 in advance for that Company. In order to repay these advances, Agnew and Sheppard made the bills which they drew on their debtors in this country, payable to Perchard and Brock. And in this way they transmitted certain bills to them, payable in this manner, drawn on James Brackenridge and others, residing in Ayrshire. These bills were afterwards accepted; but when they became due, payment was refused. The present action was therefore brought against the acceptors by Perchard and Brock, and their attorney. In defence it was

Pleaded: The bills in question were accepted as value for contraband goods which the defenders never received. And at any rate, for the price of such goods, no action can be sustained. And as this defence would be good against Agnew and Sheppard, it must also be good against the present pursuers, who are merely their agents in this country. The bills are only made payable to them on account of the greater conveniency and advantage of remitting money to London, than to Guernsey. The pursuers, according to their own admission, give the drawers no credit for bills in this situation, but only for their proceeds when received.

received. They, therefore, are not entitled to the same privileges with onerous purchasers of bills, who, upon the faith of them, immediately advance their contents to the drawers. They must be considered as holding the bills in question, either as consignees of the drawers, or as *creditores hypothecarii* for the sums advanced by them. In either view, they can have no higher right to the bills, than they would have to any other mercantile goods possessed upon the same footing, that is, a right burdened with every exception competent against their author.

Besides, if the pursuers are to be considered as onerous holder there is an end to the objection of *pactum illicitum* in smuggling contracts, as it is a very easy matter for natives of this country, who carry on an illicit trade, to take their bills payable to a friendly house in Britain, in place of making them payable to themselves.

Answered: The pursuers did not receive the bills in question merely for the purpose of getting payment of them, as factors for Agnew and Sheppard. They received them as a partial reimbursement of former advances made to that Company. Having, therefore, formerly given full value for these bills, they are onerous holders, just as much as if they had paid down their contents at the time of their delivery; 7th January 1757, Sir John Douglas against Elliot; Fac. Coll. No. 11.—12th February 1778, Burnet against Ritchie; Erskine, b. 3. tit. 2. § 31. Indeed, if a contrary rule were established, it would be destructive to the commerce of bills, as at least one half of those which occur in mercantile transactions, are granted not for money instantly received, but in payment of debts formerly contracted.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: Bills sent to bankers or others, as value in account, are considered by merchants as having every privilege of bills sent for any other sort of value, and, on faith of them, those to whom they are transmitted, give credit, and make further advances.

The Court, by a great majority, found, “That the pursuers “were onerous holders of the bills in question, to the extent of the “balance due to them by the drawers; and therefore repelled the “defences.”

Lord Reporter, *Abercromby*.
Clerk, *Menzies*.

Aft. *Connell*.

Alt. *Maconochie, Corbet*.

R. D.

N° XXXI.

February 21. 1793.

NEIL M'CALLUM,

. A G A I N S T

JAMES CAMPBELL.

TITLE TO PURSUE.—*A general service as heir of line is not a sufficient title to pursue in a reduction of a right to lands on which infestment has followed, where the pursuer, if successful, must take them up as heir of provision.*

IN the year 1725, Neil Macindoe, proprietor of the lands of Kilchoan, resigned them into the hands of Patrick Campbell, the superior; whereupon he obtained a new charter, granting them to himself, “in vitali reditu duran. omnibus suæ vitæ diebus, et post ejus decessum, hæredibus masculis legitime procreandis inter eum et Annam Maccallum, ejus sponsam; quibus deficientibus, hæredibus masculis legitime procreandis de ejus corpore, ullo subsequente matrimonio; quibus deficientibus, *Duncano Macindoe* in Kilchoan, filio patris dicti Nigelli Macindoe, et hæredibus masculis legitime procreatis, five procreandis de corpore dicti Duncani Macindoe; quibus deficientibus *proximis legitimis hæredibus masculis* dicti Nigelli Macindoe quibuscunque; quibus etiam deficientibus *ejus hæredibus et assignatis quibuscunque*, hæreditarie et irredimabiliter.”

Neil Macindoe took infestment in terms of the charter, and died, leaving Mary, an only child; the succession therefore opened to Duncan Macindoe.

Duncan had only one son, who did not long survive his father. On his death, John Macindoe took up the succession under the charter, as nearest lawful heir-male of Neil; and on the 16th February 1753, Mr Campbell, the superior, granted him a precept of *clare constat* in that character, upon which infestment followed.

A few weeks previous to his obtaining this precept of *clare*, John Macindoe executed a disposition of the lands in favour of Mr Campbell, containing a procuratory of resignation *ad remanentiam*, on which an instrument of resignation followed on the 19th February 1753, which was duly recorded.

When the period of the long prescription from the date of this transaction had only a few weeks to run, Neil M'Callum, son of Mary, daughter of Neil Macindoe, served heir in general to his grandfather, and brought an action of reduction and improbation against Mr Campbell, and the representatives of John Macindoe, in order to set aside their titles, *1/2*. Not only because John Macindoe was not the heir-male of Neil, but because there were no heirs-male in existence, so that the succession opened to him under the

the last destination of the charter 1725, to heirs whatsoever. *2dly*, Because the precept of *clare constat* granted to John did not specify any chain of connection, from which it could appear that he was the heir-male of Neil. In defence it was

Pleaded: 1st, The pursuer's general service as *legitimus et propinquior hæres* of Neil, does not give him a title to carry on the present action. Although the fact established by the service may be true, it does not follow, that the preceding destinations in the charter 1725 have failed, and that the pursuer has now right to the lands in question; nor has he in any shape connected himself with the lands.

2dly, The rights produced are sufficient to exclude the pursuer's title, upon the defender's instructing the fact, that John Macindoe his predecessor's author was Neil's nearest lawful heir-male, of which he now offers a proof. He will also instruct, that there are other heirs-male of Neil still in existence, which must completely bar any right on the part of the present pursuer; and this proof is thought to be competent, being precisely analagous to the proof of possession, which the Court uniformly allow when a prescriptive right is founded on as a title to exclude.

Answered: 1st, Unless the pursuer's present title is sustained, he must be for ever excluded from insisting in the present action. It is impossible for him to obtain a special service as heir of provision to his grandfather, because while the precept of *clare* and infestment in favour of John Macindoe stand in the way, it can never be said that his grandfather died last vest and seised in the lands. Neither can the pursuer expedite a general service, as heir of provision to his grandfather, because before obtaining it he must prove, that all the heirs-male called to the succession have failed. But how can this be done, till the precept of *clare* in favour of John Macindoe, asserting the existence of an heir-male, be reduced. Besides, it has been decided, that a general service is a sufficient title in the reduction of rights on which infestment has followed; Kilk. 6th November 1746, Horns against Stevenson, *voce* Title to pursue. And even if the pursuer had not been served either in general or special, yet in the circumstances of the present case, where it is impossible he can establish any feudal or personal right to the lands till the defender's titles are set aside, his right of blood alone ought to be held sufficient to enable him to insist in the present action.

2dly, The defender in reality acknowledges, that his title, in its present situation, is not sufficient to exclude; for he admits, that in order to render it so, certain extrinsic evidence is necessary. The proof offered too is incompetent *hoc statu*, and the reasoning from the case of prescription inconclusive. If a deed *ex facie* defective were founded on as a prescriptive title, a proof of possession would not be granted, unless the action were allowed to proceed in its usual course; 4th July 1781, Marion Sinclair against Sinclair.

But further, a precept of *clare constat* is in no case effectual against third parties; Stair; b. 3. tit. 5. § 26.; Erskine, b. 3. tit. 8.

§ 71.;

§ 71.; Bankton, b. 3. tit. 5. par. 91. And, at any rate, the one in question is fundamentally null, as it neither specifies the propinquity of the vassal to the supposed ancestor, Stair, b. 3. tit. 5. § 35.; Erskine, b. 3. tit. 8. § 66.; nor the character under which he assumes the succession. He should have been styled, not merely heir-male, but heir-male and *of provision* to Neil Macindoe; 18th November 1788, Reid against Woods.

The Lord Ordinary found, that the titles produced were not sufficient to exclude.

Upon advising a reclaiming petition, with answers, the Court were of opinion, that the pursuer's *present title* was insufficient; but at the same time, it was observed, that the defect might be remedied, notwithstanding the existence of the precept of *clare constat*, in any of the following ways: 1st, By a special service *as heir of provision* to his grandfather: 2^{dly}, Perhaps even by a general service *in that character*: Or, 3^{dly}, By an adjudication on his own trust-bond, followed by a charge to the superior to enter him. It was also observed, that an infestment flowing *a non domino* does not exclude a second.

The Lords “recalled the interlocutor reclaimed against, and “found the pursuer had not yet produced a sufficient title, but allowed him to do so *cum processu*, and lifted process for that effect.”

By pronouncing this judgment, the Court had no occasion to decide respecting the sufficiency of the defender's title to exclude; but on this point they seemed to be of the same opinion with the Lord Ordinary.

Lord Ordinary, Swinton.

Alt. M. Ross, Arch. Campbell.

Act. Solicitor Blair, Fletcher.

Clerk, Sinclair.

R. D.

N° XXXII.

February 21. 1793.

ALEXANDER SMOLLET,

AGAINST

BELL and RANNIE, and others.

PROOF.—*It is competent to prove by facts and circumstances, that one of two joint obligants in a bond is only cautioner for the other, so as to entitle him to a total relief out of the bankrupt estate of the co-obligant.*

ALEXANDER SMOLLET and the late Alexander Pentland were joint obligants in a bond for L. 300. The whole sum was paid by Smollet, who, in the ranking of Pentland's creditors, stated a variety of circumstances in order to establish that the bond was granted solely for behoof of the latter, and craved a total relief.

The creditors, on the other hand, contended, that Mr Smollet being *ex facie* of the bond a joint obligant, the presumption thence arising against him could only be removed by awriting equally formal with the bond itself; Erskine, b. 4. tit. 2. § 21.

The Court had no doubt of the competency of a proof by facts and circumstances, and found "it sufficiently instructed, that the joint bond granted by the pursuer and Alexander Pentland was a cautionary obligation undertaken by the pursuer for Mr Pentland, and remitted to the Lord Ordinary to proceed accordingly."

Lord Ordinary, *Ankerville.*
Clerk, *Menzies.*

Aft. *Honyman.*Alt. *Wight.*

D. D.

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N° XXXIII.

N° XXXIII.

February 23. 1793.

DAVID PARK,

AGAINST

JOHN RUTHERFORD,

JURISDICTION.—COMMISSARY COURT.—*In questions of debt it is competent for a Commissary to decern for expences of process and of extract, though thereby the sum contained in the decree should exceed L. 40 Scots.*

DAVID PARK having obtained from the Commissary-depute of Peebles a decree against John Rutherford, for L. 3:6:6 of principal, with 15 s. of expences of process, and 3 s. for expence of extract, presented a bill, praying for letters of horning in common form. The clerk to the bills refused to write upon it, in respect the sum included in the decree exceeded L. 40 Scots. But the case having been reported by the Lord Ordinary on the bills, the Court were unanimously of opinion, that as the excess was occasioned merely by the expence of process and of extract, the prayer of the bill ought to be granted.

Lord Ordinary, Craig.

D. D.

N° XXXIV.

February 26. 1793.

JAMES WEMYSS and others,

AGAINST

WILLIAM WEMYSS.

WITNESS.—*Objection that witnesses were precognosced before a Justice of the Peace at the instance of the pursuer in a civil action, repelled.*

DAVID WEMYSS named William Wemyss his sole executor, to the exclusion of his nearest of kin, who resided in a different part of the country.

Upon

Upon David's death, James Wemyss, one of the nearest of kin, came to the place of the deceased's residence, where, entertaining suspicions that the will had been obtained by improper means, he presented a petition to two Justices of the Peace, praying, that the surgeons and others who had been most with the deceased during his illness, might be examined; and the declarations of several persons were accordingly taken in their presence.

None of the persons examined were allowed to be present during the examination of the rest, till their own was finished; but those first examined were permitted to hear the declarations of those who came after them.

Some time after the nearest of kin caused the declarations to be cancelled, each in the presence of the person by whom it was emitted. And in a process of reduction afterwards raised against the executor, they proposed to adduce as witnesses the persons who had been thus examined.

The defender

Objected: The peremptory diets of Court, and the accuracy required in laying the indictment, render precognitions necessary in criminal cases; and as they are taken at the instance of a public officer, who cannot have any private interest in the matter, no bad consequence can result from them.

But such a practice would be both unnecessary and dangerous in civil actions, where the pursuer is allowed considerable latitude both in framing his libel, and in leading his proof. In such cases, too, precognitions are taken by a party interested in the issue of the cause, in absence of his opponent, in a loose and inaccurate manner; and, in these circumstances, the persons examined will hazard assertions which they would not have made upon oath, but which they may be afterwards ashamed to retract. The practice of taking such precognitions accordingly has always been condemned by the Court; 14th July 1621, Livingston against Galloway, Durie; Fountainhall, vol. i. p. 286, Campbell; 4th August 1778, Bogle against Yule; 10th August 1785, Fall against Sawers.

The objection is the stronger that the witnesses were examined in presence of each other, and were afterwards shewn their declarations, so that even with the best intentions, their after evidence will be biased, and, if so inclined, they may frame a connected story, the falsehood of which it may be impossible to detect.

In the case of the Lochmaben rioters, the Court of Justiciary refused to allow certain witnesses to be examined, merely because they had been present during the precognition of the rest.

The Lord Ordinary allowed the witnesses "to be examined, reserving all objections to their credibility."

At advising a reclaiming petition, the Court expressed their strong disapprobation of taking precognitions in civil causes, but were nevertheless unanimously of opinion, that the objection did not in

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this case amount to a total exclusion of the evidence of the persons formerly examined.

The petition was refused without answers.

Lord Ordinary, *Swinton*.
Clerk, *Sinclair*.

For the Petitioner, *Tait*.

D. D.

N° XXXV.

February 26. 1793.

The CREDITORS of John Jackson,

A N D

HARRIET PYE ESTEN,

A G A I N S T

STEPHEN KEMBLE.

POSSESSORY QUESTION.—*Prima facie evidence of right to an exclusive privilege, held sufficient to authorise an interdict retinendæ possessionis.*

KING.—*Under what seal should a patent establishing a theatre in Scotland pass? argued.*

BY 10 Geo. II. chap. 28. § 5. it is enacted, That no person shall be authorised “by letters-patent from his Majesty, or “the licence of the Lord Chamberlain,” to exhibit theatrical entertainments, except within the liberties of Westminster, or the actual residence of his Majesty.

By 7 Geo. III. chap. 27. § 19. This statute is so far repealed as to allow his Majesty to establish by letters-patent a theatre in Edinburgh, to have the same privileges, and to be subjected to the same regulations as any other in Great Britain.

In 1769 a patent was obtained in name of Mr Davidson, solicitor at London, and by him conveyed to Mr Ross of the Theatre Royal Covent-Garden.

This patent passed under the Seal of Great Britain. Mr Ross in consequence erected a theatre, partly at his own expence, and partly by subscription.

In

In 1785 he conveyed his interest in the patent, building, and furniture of the Theatre, to Mr Jackson.

The patent expired in 1788, and a new one was granted in favour of the Duke of Hamilton and the Right Honourable Henry Dundas, and their assignees. This patent, like the former, passed the Seal of Great Britain.

Mr Jackson continued to be manager of the Theatre, but without either an express lease or assignment from the patentees, till summer 1790, when he became bankrupt, and his interest in the Theatre passed into the hands of his creditors.

His creditors allowed him to continue manager for the first year after his bankruptcy; but they resolved to let the Theatre for the next season to the highest bidder, provided he was approved of by the Lord Advocate, the Lord Provost of Edinburgh, and the Dean of Faculty of Advocates; a condition added, in order to secure the consent of the patentees, which was now applied for.

Mr Dundas approved of this measure; the other patentee returned no answer to the application.

Mr Kemble was the highest bidder at the auction in November 1791; but though the lease was extended alone in his name, it was understood betwixt him and Mr Jackson that they should have a joint interest in it, and the approbation of Mr Dundas, through the medium of the gentlemen above mentioned, was obtained jointly for both.

In November 1792, the creditors let the Theatre to Mrs Esten for the ensuing year, and her appointment was approved of by the Duke of Hamilton.

Mr Kemble, trusting to the patronage of the other patentee, whose consent he afterwards obtained; and being perhaps advised, that the patent could not confer an exclusive privilege, took a lease of the building called the Circus, which he fitted up as a theatre.

A few days before the New Theatre was to be opened, mutual bills of suspension were presented by Mr Kemble, and Mr Jackson's creditors and their lessee. The former craved, that the other party might be prohibited from disturbing him in his acting, the latter craved an interdict against the opening of the New Theatre. Both were reported from the bill-chamber, when the points at issue came to be, the validity of the patent, the competency of entering into that discussion *hoc statu*, and which of the parties was entitled to possession under it.

On the two first, Mr Kemble

Pleaded: To guard the Crown from the attempts of interested individuals, it has wisely been provided, that all grants should be examined by persons skilled in the law, and in high responsible situations; Blackst. vol. ii. p. 346; and as evidence of its having undergone that examination, it has become essential in point of solemnity, that every grant should have the proper seal appended to it; Blackst. vol. ii. p. 348. A grant without such seal is like a bond destitute of the legal solemnities, the omission of which no evidence can supply.

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By the 24th article of the Union, one seal was appointed to be used for authenticating all public national acts, in which the whole united kingdom is concerned, and matters of private right relating solely to England, and another to be kept in Scotland, for authenticating all deeds which only concern "offices, grants, commissions, and private rights within that kingdom."

The wisdom of this enactment is evident. The public law of the two countries was from the date of the Union to be the same. In national acts, therefore, his Majesty had occasion only for one set of advisers, and one seal was sufficient for both kingdoms. But the municipal law of the two countries was to continue different, and before his Majesty could make a grant in which that of either was concerned, it was proper that it should bear *in gremio* legal evidence of its having been examined by persons skilled in the law of that particular country which was to be affected by it.

Accordingly, in practice, grants relating to private right, and patents in particular, are examined by a different set of officers, according as they are to affect the one or the other of the united kingdoms.

When a petition for a patent which is to take effect in Scotland is presented to the King, it is transmitted to the Lord Advocate; and upon his reporting that it is not inconsistent with the law of Scotland, and after going through the proper forms, it passes the Great Seal of Scotland.

In like manner, one of the first steps in the progress of an English patent is its obtaining the approbation of the Attorney and Solicitor-General; Blackst. vol. ii. p. 347.

Since such was the object of keeping the seals distinct, the one cannot be substituted in place of, or be held to include the other. It might as well be maintained, that letters of horning might pass under the Great Seal of Scotland, instead of the Signet, or that a Crown-charter conveying lands in this country might pass the Seal of Great Britain upon the report of the Attorney or Solicitor-General.

The patent in question regulates a matter of private right, and as such ought to have passed the Great Seal of Scotland. There is no evidence, therefore, that it has been examined by the proper officer. The Lord Chancellor, in appending the Great Seal of Britain to it, acted *ultra vires*.

Answered: A patent passing under the Seal of Great Britain, and authenticated by the Lord Chancellor, can be set aside only in a regular action of declarator, and not in the summary process of the bill-chamber, where the Court must necessarily proceed upon *prima facie* evidence.

And were this an action of declarator, there would be great reason to doubt, if an admitted irregularity in passing the seals would annul the patent; at least the 27 Henry VIII. c. 11. § 3. which regulates the progress of writs through the offices in England, annexes not nullity, but penalties to any deviation.

It is admitted, that the ultimate object of the practice of sealing grants is, that they may be examined by persons capable of judging of
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of their propriety. The Theatre to be erected in Edinburgh was to have the same privileges, and to be subject to the same regulations as those in England. No person therefore was so well fitted to advise his Majesty as to the propriety of granting it as the Lord Chamberlain, (in whose office the patent had its origin, and who has the supreme controul of theatrical exhibitions in both countries), and the other great officers who had a share in its execution.

The extension of the revenue-laws of England to both countries, has introduced an exception from the 24th article of the Union, in the case of the Commissioners of the Excise and Customs in Scotland, who are all named in one commission, passing under the Seal of Great Britain. Upon the same principle, the patent for the Edinburgh Theatre should pass under that Seal.

Replied: In a question about a corporeal subject, it is easy to consider the possession apart from the right; because a man may be *bona fide* possessor of a house or a field, without being proprietor of either. But in claims of exclusive privilege, the question of possession includes that of the right; and if there is no exclusive privilege, there can be no possession.

Mrs Eften therefore must be considered as the pursuer in this case; and unless she can shew that she has an exclusive privilege, the defender must be assilzied; Erskine, b. 2. tit. 1. § 24. & 27.

A majority of the Court were of opinion, that *hoc statu*, and when the patentees were not in the field, it was unnecessary to examine the validity of the patent, which had sufficient *prima facie* evidence in its favour, to authorize the interdict demanded by Mrs Eften. It is executed in the same manner (it was observed) as the original patent in 1769, and ever since that period the Edinburgh Theatre has been understood to be under the protection of the law; its legality is supported by the authority of the great officers who had a share in the execution of it, and by that of the patentees who acted under it. In these circumstances, the possession cannot be summarily inverted; 12th February 1773, Sinclair against Sutherland. The present question is very similar to what occurs in cases of affrication to a mill, where the process for abstractions is competent without the production of titles, the tenants being the only parties to it. But in the declaratory action, the proprietors must be cited, and titles produced.

As to the remaining point, the decision of the Court depended upon a variety of circumstances, which it is impossible to reduce into the form of a report, and upon which a majority of the Court were of opinion, that Mrs Eften was in possession under the patent, and was entitled to continue it.

“ The Lord Ordinary, 5th February 1793, having advised with
 “ the Lords, passed the bill (offered by Mrs Eften) on caution,
 “ and prohibited Stephen Kemble, or any person acting under him,
 I “ from

“ from opening any Theatre for the performance of plays, inter-
 “ ludes, or other entertainments of the stage, within the city of
 “ Edinburgh, or suburbs thereof, or within twenty miles of the
 “ said city, all in terms of the statute, 10 George II. c. 28.”

Upon advising a reclaiming petition and answers, “ the Lords
 “ adhered.”

Lord Ordinary, *Swinton.*
Arch. Campbell jun.
Clerk, Sinclair.

For Jackson's Creditors, &c. *Solicitor-General, Macomachie.*
Alt. Lord Advocate, Dean of Faculty, John Clerk.

D. D

N° XXXVI.

February 26. 1793.

Sir WILLIAM JARDINE,

A G A I N S T

Lady DOUGLAS, FRANCIS SHARP, and others.

RUN-RIDGE.—1695, c. 23.—A decree of the Sheriff giving off nine contiguous acres, supported.

THIRLAGE.—The servitude of thirlage transferred, though the proprietor of the mill was not a party in the action of division.

THE barony of Sibbaldbie, the property of the Marquis of Annandale, is thirled to the mill of Heugh, which belongs to Sir William Jardine. Part of the barony having been inconveniently interspersed with the neighbouring estates, and particularly with those of Lockerby and Hoddam, a process of division on the act 1695, c. 23. was brought before the Sheriff, in which a final decree was pronounced in 1774; but to this process Sir William Jardine was not made a party.

By this decree, the Marquis ceded at one place nine acres. The tenants of these lands from that time discontinued, and those of the lands given in exchange began to bring their grain to the mill, in terms of the thirlage.

In 1788, Sir William Jardine brought a declarator of thirlage, in which, *inter alia*, he contended, that the lands which had been given off to the estates of Lockerby and Hoddam, were not thereby liberated from the thirlage to his mill, and

Pleaded: 1mo, It is now a settled point, that the statute 1695, c. 23. does not authorise exchanges of land to any higher extent than four acres at one place; 17th January 1782, Lady Gray against Blairs. This division, therefore, can be considered only as a private excambion.

2do, The decree can at any rate have no effect against the pursuer, who was not a party in the action.

When a subject belongs in common to two persons, neither can make either a total or partial exchange, however advantageous for both, without consent of the other, and both must be parties in a process on the act 1695.

By parity of reason in the case of a predial servitude, no transaction with the owner of the servient tenement can have effect against the owner of the servitude, if he is not made a party to it. In the case, 8th February 1791, Ballardie against Bisset*, it was found, that the proprietor of the servient tenement could not be obliged to go to another mill, though equally convenient. As little, on the other hand, can one servient tenement be substituted for another, without the consent of the proprietor of the dominant tenement.

The statute meant to regulate the interest of conterminous heritors, but without injuring third parties. In processes upon it, as the division is only made with a view to equality of value, the exchange may often be such as either entirely to hinder the uses of the servitude, or, as happens in this instance, very much to lessen its profits.

Answered: 1mo, The decision in the case of Lady Gray was the first which so far limited the application of the act. In the present case, the division was good according to the notions which were entertained of the law at the date of the decree, and it has till now remained unchallenged.

2do, It is no objection to the decree, that the pursuer was not a party to it, unless he can also show that he was a loser by the transaction. Servitudes, and that of thirlage above all others, receive a strict interpretation; Erskine, b. 2. tit. 9. § 8. 33. They must be exercised in the way least burdensome to the servient tenement; the proprietor of which may make whatsoever alterations on the subject he thinks proper, provided the servitude is not injured. Hence the converse of the decision Ballardie against Bisset would not be supported.

By the decree of division, the lands got in exchange come completely in place of those given away. The superior, though no party in the action, cannot have recourse against the lands ceded by his vassal for his feu-duties. A tenant in the same situation must accept of the lands allotted to him; June 1792, Bruce against Bruce and Bow. A liferenter must do the same, and by the like rule, the servitude of thirlage must be transferred.

The Lords assilzied from this conclusion of the declarator, by two consecutive interlocutors.

When the last was pronounced, it was

T

Observed

* Not collected.

Observed on the Bench: The excambion here made was not a voluntary but a judicial one, under the statute, as it was understood at the time, and cannot now be opened up. Where heritors make voluntary exchanges of astricted lands, there may be room for insisting that the thirlage is not affected; but when divisions are made under the statute, the proprietor of the mill cannot follow the ridges as they were formerly interspersed, and it is not necessary to make him a party more than the superior, though he may appear for his interest, if he pleases.

The Court at the same time had regard to the pursuer's long acquiescence, and to the circumstance of no actual damage from the transaction being shown.

Lord Ordinary, *Stonefield*.
Clerk, *Homes*

Act. *Dean of Faculty*.

Act. *David Williamson*.

D. D.

N° XXXVII.

February 26. 1795.

The EARL and COUNTESS of MORTON,

AGAINST

The REPRESENTATIVES of Daniel Murray, and others.

REMOVING.—Act of federunt, 14th December 1756.—*The obligation of the cautioners in the suspension is limited to what is decreed for by the Sheriff.*

Does the act apply to illiquid prestations?

ALEXANDER RODGER, one of the Earl of Morton's tenants, having fallen more than a year's rent in arrear, a process of removing upon the act of federunt 1756 was brought against him before the Sheriff. The summons, after specifying the sum due as arrears of money-rent, and conversion of kain, concluded, that Rodger should be decerned either to remove or to find caution for payment of the said arrears, and for punctual payment of the rents for five subsequent years.

The Sheriff decerned accordingly.

A bill of suspension was passed, on condition of his "finding caution for his whole arrears, and the rents for the five subsequent years."

Daniel

Daniel Murray and others became his cautioners, and were taken bound not only for the arrears and rent for the five subsequent years, but also for "whatever sums may be awarded, in name of damages and violent profits, and such other sum or sums of money as the said Alexander Rodger shall be found liable in to the chargers, in case it shall be found by the Lords of Council and Session, after discussing the suspension to be expedite hereupon, that the said Alexander Rodger ought so to do."

The Earl of Morton afterwards brought an action of damages against the cautioners for the non-performance of certain prestations relating to inclosures, &c. which were stipulated in Rodger's tack. The cautioners

Pleaded: In this, as in every other suspension, the caution found must be regulated by the demand of the charger. In the summons before the Sheriff, nothing is said about the prestations now claimed.

The act of federunt, and the interlocutor passing the bill of suspension require caution only for rent and arrears; expressions which, in technical as well as common language, relate to the liquid tack-duty, and not to illiquid prestations. The latter are not connected with one year of the tack more than another, and could not have been in the view of the cautioners when they undertook the obligation.

By the above narrated clause of the bond, nothing more is meant, than that in case the reasons of suspension should be found to be groundless, the landlord should be indemnified for the passing of the bill.

Answered: When the act of federunt fixed upon the tenant's being a year's rent in arrear, as such a mark of his bankruptcy as to entitle the landlord to recover possession of his farm, or have better security for performance of the contract, it never meant to distinguish between the annual tack-duty and those prestations which are often of more importance, and on account of which its amount is diminished. The words "arrear and rent," which are used in the act of federunt, comprehend every thing that is exigible by the landlord.

The act declares, that the bill shall be passed upon caution, "for implement of what shall be decerned for in the suspension or advocacy, and damages and expences." Now, the prestations might surely have been decerned for in the suspension. Besides, the word 'implement' would not have been used, if the payment of money only had been in view.

This is confirmed by the clause in the bond stated in the narrative.

The Lord Ordinary and the Court, by their first interlocutor, (19th December 1792), decerned against the cautioners for damages, on account of the tenant's not having fulfilled certain prestations due before their bond was granted.

But upon advising a reclaiming petition and answers, the Lords found "that the petitioner's bond of cautionry extends only to the rents and arrears of rent, and conversion of kain specified in the libel of removing before the Sheriff, and decreet thereon." It was at the same time observed by some of the Judges, that independent of the terms of the libel, and decree, the act of federunt applies only to liquid annual payments, and not to illiquid prestations.

A reclaiming petition was refused without answers on the 21st May 1793.

Lord Ordinary, Justice-Clerk:
Alt. Patison.

A& Geo. Fergusson, Cha. Hope.
Clerk, Menzies.

D. D.

N° XXXVIII.

February 27. 1793.

(TEIND COURT.)

JOHN SCOTT, and others,

AGAINST

The COLLEGE of GLASGOW.

TEINDS.—1st, *In a valuation of teinds, where the value of lands in the natural possession of the proprietor has been ascertained in money by the evidence of the witnesses adduced, the titular cannot afterward insist that any part of the teind shall be converted into grain.*

2d, *A titular has no right to infeftment in the lands in security of the valued teind.*

JOHNS SCOTT and others are proprietors of certain lands kept by them in their own natural possession, the teinds of which belong to the College of Glasgow, who had long been in the practice of letting leases of them to the heritors for payment of a victual-duty. The heritors, however, having brought processes of valuation, a proof of the rental was allowed in common form. The witnesses examined estimated the value of the lands entirely in money, without ascertaining their worth in a victual-rent.

When the proof was reported, it appeared that a fifth of the proven money-rent would exceed in point of value the victual teind-duty formerly paid. At this stage of the process the College insisted, *1st*, That notwithstanding the money-valuation, they should be found entitled at least to the accustomed quantity of victual-teind, taking only the excess in money: *2^{dly}*, That the pursuers should be ordained to infest them in the lands in security of the valued teind-duties. In support of the first point, they

Pleaded: The act 1633, c. 17. was introduced in order to remove the inconveniencies arising from the former practice of allowing the titular to draw his tithes, and as making a violent encroachment on the common law, must be strictly interpreted. It contains no provision for making teinds payable in money in place of grain, and therefore every consideration, whether drawn from their original nature, or from the purposes to which they are still subservient, seems strongly to recommend a valuation in victual in all cases where the lands are not let to tenants for a money-rent. Neither should the accidental circumstances of the lands in question having been valued in money make any difference. It would have been an easy matter for the College to have desired the witnesses to say what the lands were worth yearly in victual as well as in money. And they are still willing that the valuation in money shall be converted into grain at the average of the fiars for such number of years back as the Court shall think reasonable.

Answered: It is true, that the act 1633, chap. 17. does not enact that teind-duties shall be paid in money; but as little does it give titulars a right to exact delivery of them in grain. But from the express provision made in that statute for the sale of teinds at a money-price; and from its spirit and intention, which was to produce an immediate and still increasing disparity between the actual teind and the valued teind-duty, there is the strongest ground to conclude, that valued teinds were meant to be exigible only in money. At any rate, all that the College can demand is, "a fifth part of that rent which the lands are truly worth, and might have paid had they been rented to a tenant;" Erskine, b. 2. tit. 10. § 32. *in fine*. This, it is clear from the proof, they have got. But if their present demand of converting part of the valued money-duty into victual at the fiars were granted, they would evidently get more, as the fiars are always lower than the real worth of the grain.

The Court, without any reasoning on the subject, repelled the claim.

In support of their *second* claim, the College

Pleaded: While the titular drew his teind-sheaves, he would take them as soon as they were ready. But when a fixed teind-duty

duty came to be substituted in their place, he would not attend so accurately to the progress of each heritor's harvest as to enable him to get his valued teind before the corns were removed from the ground. Accordingly, by the act 1633, chap. 17. the heritors is ordained to "give security" for its payment. Now, by this security, nothing else can be meant but infestment; and so it is explained by Mackenzie, b. 2. tit. 10. § 16.; and Erskine, b. 2. tit. 10. § 38.

Answered: The act 1633, chap. 17. leaves it entirely with the Commissioners of Parliament to determine what security shall be given to titulars for their valued teind-duties. It consequently still remains with the Court to make such provision in that respect as they shall judge proper. It would certainly, however, be a great and unnecessary hardship on small proprietors to be put to the expence of expeding infestments for the security of titulars. Indeed, from the style of similar enactments in the act 1633, chap. 19.; and in the decrees-arbitral of King Charles I. it seems clear, that the Legislature never intended that the titular should be secured in this manner. See also Mackenzie's Observations on 1633, chap. 15. Besides, the statute 1633, chap. 19. puts titulars and ministers on the same footing; so that, were the claim of the College to be sustained, the clergy might with equal justice insist for infestment on the lands of every heritor who pays them stipend. But, in fact, neither require any additional security, as at present both are put in possession of a decree upon which they can raise every sort of diligence necessary for their safety.

It was observed on the Bench, that although this second claim seemed to derive some support from the act 1633, c. 17. yet as it appeared unnecessary, and was unprecedented, it ought not to be granted.

The Court also repelled this claim.

A&T. Solicitor-General, Morthland.

Att. Jo. Miller jun. Davidson.

R. D.

N° XXXIX.

N° XXXIX.

February 27. 1793.

(TEIND COURT.)

JOHN GORDON,

AGAINST

The EARL of FIFE, and others.

TEINDS.—*When the teinds are valued in money, an augmentation cannot be modified in grain.*

THE Reverend John Gordon, minister of the parish of Strathdon, obtained, without opposition, an augmentation to his stipend, which was modified in grain.

The heritors having afterwards discovered that almost the whole teinds were valued in money, in a reclaiming petition

Pleaded: The clergy were parties in the submission to Charles I. By his decret-arbitral, and by the various statutes made for enforcing it, it is declared, that valuations made under its authority, in which the minister of the parish, and in case of a vacancy, the presbytery are necessarily defenders, shall never afterwards be called in question.

The teinds in this case have been valued in money, and to oblige the heritors to pay them in grain, would be to alter both the nature and extent of their payment.

Answered: Valuations in money are exceedingly unfavourable to the minister, who, though nominally a party in the action, from the temporary nature of his right, seldom thinks it worth while to appear. The Court, however, will not suffer the interest of the benefice to suffer from his inattention; 30th November 1791, Minister of Glenluce against the Earl of Galloway.

Observed on the Bench: In later cases the point has been settled in favour of the heritors.

The Court altered the former interlocutor, and modified the stipend in money.

A. W. Robertson.

Alt. W. Murray.

. D. D.

N° XL.

March 1. 1793.

DOUGLAS, HERON and COMPANY,

A G A I N S T

WILLIAM RIDDICK.

PRESCRIPTION.—*Septennial prescription introduced by act 1695, c. 5. barred by a decree in absence.—Cautioner in that case liable only for the principal sum and interest falling due within seven years from the date of the bond.—Decree in absence not considered as a novatio debiti.—A cautioner found to be barred personali exceptione from pleading the benefit of the statute, when delay had been solicited by his factor.*

IN 1773, William Kirkpatrick as principal, and Robert Riddick and David Currie as his cautioners, granted a bond for L. 3000 to Douglas, Heron and Company, payable on the 29th of October 1778.

Robert Riddick died in 1777.

William, his son and representative, then about 16 years of age, chose curators. But the chief management of his affairs devolved on Mr Macdowal, accountant in Dumfries, who acted under a factory granted by him with their consent.

Mr Home, factor for the Company, before the bond became due, warned Mr Macdowal, that punctual payment would be expected.

For some time after that period, and both before and after the lapse of seven years from the date of the bond, a correspondence was carried on between them, in which the former stated the necessity of having recourse to legal measures, unless this and the other claims of the Company against Riddick were instantly satisfied, while the latter solicited delay, as the only means of preserving his client from bankruptcy.

In January 1779, the Company obtained a decree in absence on the bond against Riddick. A few months afterwards a partial payment was made; but no further legal steps were taken till the end of the year 1789.

Riddick being then sued for payment, contended, that the debt was extinguished by the septennial prescription introduced by 1695, chap. 5. and

Pleaded: imo, The object of the statute was to diminish the bad consequences arising from that too common facility, which leads men to enter into cautionary obligations for which they afterwards neglect to provide; it is therefore entitled to a liberal interpretation.

I

Although

Though commonly ranked under the title of prescriptions, it does not like them proceed upon the presumption of dereliction or of payment; it cannot be interrupted in the same manner, and its benefit cannot be renounced; 19th February 1724, *Norie contra* Porterfield, Edgar; Erskine, b. 3. tit. 7. § 24.; Bankton, b. 2. tit. 12. § 30. 48. and b. 1. tit. 23. § 47. It liberates the cautioner *ipso jure* at the end of seven years, in the same manner as if the bond had expressly limited the duration of his obligation to that period. Even the moral obligation to pay is then at an end, and what is paid may be recovered, *condictione indebiti*; 5th August 1778, Carrick against Carse. It contains, however, the following reservation, "That what legal diligence, by inhibition, hording, arrestment, adjudication, or any other way, shall be done within seven years, by creditors against their cautioners, for what fell due in that time, shall stand good, and have its course and effect after the expiring of the seven years, as if this act had not been made." But if a simple decree of constitution had been sufficient to exclude the benefit of the statute, this enumeration would have been unnecessary.

Besides, upon that supposition, the same effect must be given to a decree of registration, and even to the execution of the summons, (the contrary of which last was found 24th January 1712, Stewart against Hill, Dict. vol. ii. p. 117.) and the object of the statute, whether in shortening the duration of cautionary obligations, or wakening the attention of the cautioner, would be frustrated.

But the term "legal diligence," both in technical and common language, is distinguished from a decree. The latter denotes the sentence of the judge, the former the different modes in which that sentence is carried into execution; Erskine, b. 2. tit. 11.; Preface to Dictionary, p. 11. and Dictionary, vol. i. p. 537. A mere decree of constitution would not be reckoned diligence in a question on the bankrupt act 1621.

Further, it appears to have been the intention of the statute, at least such is the opinion of Mr Erskine, b. 3. tit. 7. § 24. that diligence within seven years, should not prevent the extinction of the cautionary obligation, but merely secure to the creditor the special subjects his diligence has attached during that period. No subjects, however, are attached by a decree; Erskine, *ibid.*

Answered: This statute must be strictly interpreted. It is correctory of the common law; Erskine, b. 3. tit. 7. § 23. and is of very doubtful expediency. Its chief effect has been, that persons who are in fact cautioners, are since its date taken bound as co-principals, instead of appearing in their true character.

The authority of Mr Erskine, however respectable, cannot prevail in opposition to an uniform train of decisions, in which the statute has been considered as introducing a species of prescription, capable of being interrupted in the same manner as every other; Dictionary, vol. ii. p. 117. 13th June 1738; Rowand against Lang, Home; 7th January 1752; Irvine against Copland, Kilkerran.

These decisions are equally adverse to the doctrine that the creditor is obliged to follow out the diligence he has used; Bankton, b. 1. tit. 23. § 47. This supposition is indeed altogether inconsistent with the terms of the statute; for though an arrestment or an adjudication may afterwards be followed out, the same cannot be said of an inhibition, or of a horning, which have no connection with the effects of the debtor.

A variety of cases have been quoted, in which decrees are opposed to diligence; in many others, however, they are considered as synonymous; Stair, b. 3. tit. 1. § 42. tit. 8. § 66. and b. 4. tit. 35. § 17.; Act of Sederunt, 28th February 1662. The purpose of the statute must determine whether the narrow or more extensive meaning of the word is here to be adopted; and as its great object was to prevent a growing burden from arising against the cautioner, who may perhaps have entirely forgot his obligation, the execution of a summons is surely sufficient to waken his attention.

The Court were of opinion, that the statute must be strictly interpreted; but at the same time they in general thought, that the decree must be considered as diligence, and pronounced two interlocutors to that effect.

The defender next

Pleaded: The effect of the diligence must at all events be limited to the principal and the interest falling due within seven years; Erskine, b. 3. tit. 7. § 24.; Bankton, b. 2. tit. 12. § 30.; Forbes's Inst. part 2. b. 3. ch. 2. tit. 3. § 6. Dictionary, vol. ii. p. 117. 8th July 1725, Maclellan against Allan, Edgar; 13th June 1738, Row and against Lang; 1741, Semple against Dewar*; Dict. vol. iii. p. 303.; 17th February 1780, Reid against Maxwell.

Answered: The statute declares, that the diligence used shall be effectual in the same manner as before the date of its enactment. It must therefore secure both the principal sum and interest till payment. It is true, any diligence done within the seven years, can only attach the interest due at the date of its execution; but it does not follow, that interest shall not afterwards be exigible if payment is delayed; Mackilikin against Monro, Dictionary, vol. ii. p. 117.

Besides, the decree must be held as creating a new obligation, altogether independent of the original bond.

Replied: The order of the Judge enjoining performance cannot alter the nature of the obligation to be performed.

The Court thought it established by the case of Reid against Maxwell, though some Judges doubted the propriety of that decision, that the interest falling due within the seven years could alone be demanded.

A decree in absence, it was observed, cannot be considered as a *novatio debiti*. One Judge thought a decree must have as strong effects as a bond of corroboration, and that therefore interest was due till payment.

The Court found, that the decree of constitution, could only have the effect to make the defender liable for the principal sum and interest falling due within the seven years *.

Lastly, The pursuers

Pleaded: The conduct of Mr Macdowal, which was approved of both by the defender and his curators, bars him from pleading the benefit of the statute 16th November 1748, Gordon against Tyrie; 13th July 1747, Wallace against Campbell, Kilkerran, v. Prescription.

Answered: Laying aside the diligence which has been done upon it, the bond is *ipso jure* extinguished, by the lapse of seven years from its date. If Mr Macdowal's conduct has been such as to create a new obligation, there may be room for bringing an action *de dolo* against him; but the *exceptio doli* cannot be pleaded against the defender.

The Court, by two consecutive interlocutors, found the defender "barred *exceptio doli* from pleading the benefit of the statute."

Lord Ordinary, Dregborn.

A&S. Solicitor-General, G. Fergusson.

Alt. Dean of Faculty, M. Ross, Corbet.

Menzies, Clerk.

D. D.

N° XLI.

March 1. 1793.

CHARLES ADDISON and SONS,

AGAINST

WILLIAM DUGUID, and others.

PERICULUM.—INSURANCE.—WAGER POLICY.—*It is illegal to insure that a whale-ship will return with a certain quantity of blubber.*

THE ship Leviathan belonging to Charles Addison and Sons, sailed from Borrowstounness on the 21st February 1793, fitted out for the whale-fishing trade.

In

* On the 20th November 1792, the Court had on this branch of the cause adhered to the interlocutor of the Lord Ordinary, finding the defender liable for interest, till payment.

In May 1791, Messrs Addison opened a policy, on which Mr Duguid and other underwriters insured that the ship should return to Borrowstounness with ninety butts of blubber, and obliged themselves to pay for the deficiency, at the rate of L. 7 Sterling *per* butt.

The Leviathan returned with only five butts of blubber.

Addison and Sons having brought an action against the underwriters, for payment of the loss, in defence, it was

Pleaded: The statute 19 Geo. II. c. 37. enacts, that no assurance or assurances shall "be made by any person or persons, "bodies corporate or politic, on any ship or ships belonging to "his Majesty, or any of his subjects, or on any goods, merchandises or effects, laden or to be laden on board of any such "ship or ships, interest or no interest, or without further "proof of interest than the policy, or *by way of gaming or wagering*, or without benefit of salvage to the assurer, and that "every such insurance shall be null and void to all intents and "purposes."

The present assurance falls under this statute, being just a wager, that a particular ship will get ninety butts of blubber. It is not a contract of indemnity, because, however small the quantity of blubber obtained, the deficiency was to be held as loss. It is essential to a valid policy, that it relate to an existing subject, in which the insured have an interest, but this cannot be said of the present, made before any fish had been caught; Park on Insurance, p. 259. 261. 262. 268. 272. and 273.

But besides, policies like the present are too dangerous in their consequences, both to the public and to individuals, to be supported even at common law. The high bounty given to promote this trade would, by their means, be converted into a premium to underwriters, whose obligation would render the owners indifferent to the success of their ship, and give rise to innumerable frauds on the fishing ground. Vessels not insured, for instance, might be allowed to appropriate whales caught by ships secured from loss in this manner.

Answered: The statute applies only to wager policies strictly so called, that is, to such as relate to a fact or event in which the parties have no sort of interest. But where the insured have an interest, whatever be its nature, the insurance is effectual. Thus a merchant may insure the profit he expects upon an adventure; or, if he has a cargo consigned to him, he may insure his commission upon the sales; Millar on Insurance, p. 226.; Park, 305. *et seqq.* These cases are much stronger than the present, as the object in both was to insure a contingent profit, whereas the policy in question was in fact a contract of indemnity, as the quantity of blubber insured, although it had been got, being insufficient to defray the expence of the voyage.

March 1793.

COURT OF SESSION.

85

No danger can arise to the public from supporting policies of this nature, as the statutes introducing the bounty contain a variety of provisions, which effectually prevent any abuse in its application.

The question came before the Court by a bill of suspension, presented by the underwriters, in consequence of a decree of the Judge-Admiral against them.

The Lord Ordinary refused the bill.

On advising a reclaiming petition, answers, replies and duplicates, it was

Observed on the Bench: This is clearly a gaming policy. It is precisely similar to insuring a *jactus retis*. Besides, the success depends entirely on the will of the insured, and on this account alone the policy should be voided. It would not be lawful to insure that a privateer will take a prize.

Two of the Judges were inclined to think, that this sort of insurance was lawful to the extent of indemnification. But it was suggested to be impossible in practice to draw a line; and that owners might secure themselves sufficiently, by insuring the ship, the freight, and a certain sum upon the fish, under the provision of their being actually taken.

The Court passed the bill.

Lord Ordinary, *Gardenston*.
Clerk, *Menzies*.

Ald. *Rolland, Hay*.

Ald. *J. Clerk, W. Clerk*.

R. D.

7

Y

N° XLII.

N. B. The underwriters were willing to waive the objection to the legality of the policy, and to rest their defence upon the information on the part of the insured not having been complete. The Court, however, went entirely on the first defence, from which they did not think the underwriters *in hoc statu* entitled to depart.

N° XLII.

March 1. 1793.

DONALD CAMPBELL,

A G A I N S T

JOHN JOHNSTON.

REMOVING, 1555, c. 39.—*Found sufficient that the precept of warning was affixed to the door of the church-yard.*

The precept is valid, although the tenant is warned to remove at the separation of the crop from the ground, instead of Martinmas.

IN October 1773, John Johnston obtained a lease of a farm in Argyleshire, “for the space of nineteen full and complete years and crops from and after the term of Whitsunday last bypast, when his entry commenced to the houses, grafs and pasturage; and as to the arable land, is to be and commence at the term of Martinmas next to come in the present year.”

The lease as to the grafs, &c. expired at Whitsunday, and as to the arable ground, at Martinmas 1792. On the 31st March 1792, Captain Campbell his landlord executed a precept of warning against him on the statute 1555, c. 39.

A copy of the precept was, on a Sunday, forty days before Whitsunday, affixed to the door of the church-yard which surrounds the church of Campbeltown.

The precept warned Johnston to remove from the houses, &c. at Whitsunday, and from the arable lands at the separation of the crop from the ground.

A summons of removing was soon afterwards executed, which, after narrating the precept, proceeds thus: “And albeit it be of verity that the complainer has oft and divers times desired, &c. to leave the same void and redd, *at the said term of Whitsunday*, to the effect above mentioned; and then concludes, that Johnston shall be decerned to remove at the said term.”

The Sheriff decerned against the tenant, who, in an advocacy,

Pleaded: imo, The directions of the statute 1555, which was introduced, in order to check the arbitrary conduct of landlords, must be strictly obeyed. It requires that the precept should be read in the church, and a copy of it affixed to the most patent door of it; neither was done in the present case*; and where solemnities

* The defender offered to prove that the precept was not read even at the door of the church-yard.

solemnities are introduced by statute, all equivalents are rejected; Stair, p. 335. § 43.; Bankton, b. 2. tit. 9. § 55.; Dict. vol. i. Execution; Harcarfe, *voce* Removing, No. 839.; Dict. vol. ii. Removing; 24th January 1782, Ranking of the Creditors of Jarvieston; 25th February 1783, Gordon against Burnet.

2do, The warning is null, as requiring the tenant to give up possession at a period when he was not obliged to remove; 6th March 1754, Earl of March against Dowie. He did not enter into possession of the arable land till Martinmas, and was entitled to retain it till the return of the same term in the year in which his lease expired. The crop is generally reaped in August and September. There is no reason why he should be deprived of the benefit of the after grafs.

3tio, The summons concludes, That the tenant shall be decerned to remove at Whitsunday, and is therefore inconsistent, both with the lease and precept of warning.

Answered: 1mo, The church of Campbeltown has four doors, and it is not easy to say which of them is the most patent; but it is surrounded by the church-yard, which has only one door, and upon it notifications of every sort are in practice affixed.

2do, The object of the statute was to prevent landlords from arbitrarily removing their tenants, without giving them sufficient warning of their intention. As this object has been completely attained in the present case*, critical objections to the words of the precept will not be listened to.

The crop is seldom off the ground before Martinmas, so that the tenant suffers nothing by the alleged irregularity of the warning. At any rate, all the tenant could ask, was liberty to continue in possession till Martinmas.

Besides, in rural tenements, especially those which are chiefly fitted for pasture, and in highland districts, Whitsunday is the proper term of removing, though the tenant is allowed to reap the crop, which is supposed to have been sown by him in spring.

3tio, The summons of removing narrates the precept; and although in the last sentence, when taken by itself, it seems to be at variance with it, when the whole is considered, there is no discrepancy.

Replied: When there is no lease, or when it fixes on Whitsunday and the separation of the crop, as the terms of entry and removal, it may perhaps be true, that Whitsunday is the legal term of removing. But that cannot be the case where it is agreed between the parties, that the tenant shall have, and where he pays a rent for possession during a certain number of complete years, commencing from Martinmas.

* Besides the precept executed on the 31st March, a summons of removing on the act of sederunt 1756, had been executed on the 19th and 20th of the same month. This summons, however, was not before the Court.

The Lord Ordinary pronounced the following interlocutor :
 Finds, “ *1mo*, That this process of removing is informal, as the
 “ warning is to remove at the separation of the crop ; whereas,
 “ by the terms of the tack, it is to be at Whitsunday for the
 “ grafs, and Martinmas for the arable lands ; and the summons
 “ of removing is both disconform to the tack and the warning,
 “ as it concludes for removing at the Whitsunday, without ma-
 “ king any distinction between the grafs and arable lands : *2do*,
 “ That the conclusion of the removing is materially, as well as
 “ formally wrong ; as it deprives the tenant of a crop which he
 “ might have sown and reaped on the arable land, such as bear,
 “ pease, or turnip, betwixt the Whitsunday and the Martinmas,
 “ the term of removing from the arable land by the tack.”

The Court, at advising a reclaiming petition and answers, were not moved by the first objection ; but upon the others, there was some difference of opinion.

Tenants, it was observed, must have sufficient warning to remove ; but frivolous objections must not be laid hold of, to injure the interest of the landlord. Whitsunday was, in this case, the proper term of removing ; though the tenant was entitled to the ensuing crop, which, in that part of the country, is not separated from the ground till very late in the year. He therefore suffered nothing by the terms of the precept. The summons of removing, if faulty, may be amended.

The Lords altered the interlocutor reclaimed against, and found, that the defender must immediately remove.

Lord Ordinary, *Monboddo*.
 Clerk, *Mennies*.

Act. Archibald Campbell junior.

Alt. Montgomery.

D. D.

inferior heritor, as the water is meant to be taken off above Mr Hamilton's property, and the inferior heritor is equally entitled to object, whether he be owner of both banks or of one.

In like manner, a common property arises where a stream forms a march between two tenements, and each is entitled to all the ordinary uses of the subject; but neither can make any material alteration on it, without the concurrence of the other; for, *in re communi melior est conditio probibentis*, l. 1. § 1. 2.; l. 24. § 3. *de acq. et acq. pluv. arcend. et passim*, l. 1. § 12. *de fluminibus*, &c. Bracton, fol. 234. l. 4. c. 45. *de assissa novæ diffinitione*, § 9. *de aqua diversa*; 1 Wilson, 174. Brown against Best; 25th June 1624, Bannatyne against Cranston, Durie; Hope's Maj. Practics, *de act. in factum*, Bairdie, 13th November 1713, Cunningham, Dict. v. Property; 1st July 1768, Kelso against Boyd; 5th June 1744, Fairley against Earl of Eglintoun; 1791, Jamieson against Lord Abercorn; Stair, b. 2. tit. 7. § 12. 29.; Bankt. b. 2. tit. 7. § 29. Nor is either party under the necessity of assigning a reason to justify his refusal. For although a person will not be allowed to use his property *in emulationem vicini*, no other will be permitted to use it without his consent. In the present case, however, the suspender would be a considerable loser, both in point of amenity and pecuniary advantage. In summer, a great part of the channel would be left dry, and the stream be so much reduced as to become either very inconvenient, or altogether unfit for a variety of useful purposes to which it might otherwise be applied.

Answered; Running water is from its nature common to all, and cannot be the object either of sole or joint property; *Inst. de rer. div. pr.* § 1. Voet, l. 1. tit. 8.; *de rer. div. et qual.* § 3.; Stair, b. 2. tit. 1. § 5.; Blackstone, b. 2. c. 1. The heritor indeed, through whose lands it runs, may prevent any person from having access to it, and consequently has the exclusive use and enjoyment of it; but this arises not from his having any property in the water, but from his connection with the land.

In like manner, when a river forms the boundary between the lands of two heritors, neither has a right of property in the water, but both are entitled to apply it to every lawful purpose; 7th Jan. 1749, Lyon and Gray against the Bakers of Glasgow. At the same time, in the exercise of this as of every other right, neither must act *in emulationem*, or to the direct prejudice of his neighbour; l. 24. *et ult. ff. de damno infecto*, l. 1. § 11. 21. *de aqua et aq. pluv. arcend.*; Voet, lib. 39. tit. 3. § 4.; Erskine, b. 2. tit. 1. § 2.; 9th July 1757, Trotter against Hume, 19th January 1765, Gordon against Grant. Here a lawful use of the water is sought. There is no intention to injure, and the suspender, if he pleases, may turn the stream to the like use on his side of the river. The intended cut will not materially diminish its beauty, and in all events no loss in that respect could be set in opposition to the useful purposes to which the water is meant to be applied. In these circumstances, it makes no difference whether the water is
returned

returned or not, or whether it is taken away opposite to or above the lands of the suspender.

The primary uses of water are easily supplied; and it would be unreasonable that a large river, such as the Clyde, should be rendered useless from the ill humour of an opposite heritor.

In the case of a rivulet only sufficient to supply the primary uses of water, the consent of the opposite heritor would indeed be necessary; but according to the suspender's doctrine, the same would hold even with regard to the largest river in the world, which surely cannot be maintained. Every case, therefore, must be determined according to its circumstances. The Clyde, after the claim of the charger is satisfied, will retain a sufficient quantity of water for every purpose, secondary as well as primary.

Replied: Joint property can be divided only where an equal division is possible, and where the parts retain the same situation, and can be applied to the same purposes with the undivided subject; *L. 19. § 1. ff. Comm. divid. Voet. § 5. ejus tit.* neither of which requisites occur in the case of running water. If it were true that the heritors on the banks of a river have no more right in it than any other person who can get access to it, any one heritor through whose lands it passes, or any other person with his permission, might entirely alter its course, and the inferior heritors could not oblige him to return it.

The Lord Ordinary reported the cause on informations.

The Judges differed in opinion.

The reasoning of those who thought the letters ought to be suspended, seemed in general to establish, that in the case of a private river, of whatever extent, running between the lands of opposite proprietors, the mere possibility of damage, (and as some expressed themselves) even in point of amenity, gave either a title to object to any material alteration upon its course. Whatever may be said (it was observed) of the water of which it is composed, the stream itself is the object of property, or at least of a right equally entitled to protection. The water may be used for all ordinary purposes, but the stream cannot be diverted. It is acknowledged the chargers cannot divert the whole river, and where is the line to be drawn? Manufactures will not be injured by this doctrine, because there is little danger that consent will be refused where an adequate consideration is offered; at all events, the right of private property is sacred.

Others thought, that as there was no property in running water, each conterminous heritor might take every lawful use of it, without the consent of the other. How far the erection of machinery is a lawful use, (it was observed), will depend upon the circumstances of the case; it must be considered as such where-

ever the opposite heritor is not thereby prevented from doing the same on his side of the river.

“ The Lords suspended the letters *simpliciter*, and continued the “ interdict.”

And, upon advising a reclaiming petition and answers, “ they “ adhered.”

Lord Reporter, *Dreghorn*. For the Suspenders, *Dean of Faculty, M. Rofs, John Millar jun.*
For the Chargers, *Lord Advocate, Solicitor-General, Wight, Rolland, Arch. Campbell jun.*
Clerk, *Sinclair*.

D. D.

N° XLIV.

March 6. 1793.

ARCHIBALD SETON,

A G A I N S T

The CREDITORS of Hugh Seton.

FIAR.—When a subject is conveyed to trustees for a certain person in liferent, and his children nascituri in fee, the father is not fiar.

CHARLES SMITH, in the contract of marriage entered into between his son Hugh Smith afterwards Seton, and Mrs Elizabeth Seton of Touch, obliged himself to have in readiness by Martinmas 1746 L. 8000, and to employ it on land, or other heritable security, and to take the rights in name of certain trustees for behoof of “ Hugh Smith in liferent, and the heirs-male to be “ procreate of the marriage in fee.”

Charles Smith in part fulfilled this obligation, by purchasing certain lands, and conveying them, together with an heritable bond to the trustees; but at his death there remained a balance of above L. 3000 against him.

The trustees conveyed the lands to Archibald Seton, the heir of the marriage, in terms of the trust.

The heritable bond was paid to Hugh Seton, who was himself one of the trustees, with consent of a *quorum*.

The Lord Ordinary reported the cause on memorials.

The Court were unanimously of opinion, that the effect and sole intention of appointing trustees was to prevent the father from being *fiar*. The subject (it was observed) was vested in the trustees, who held the *fee* for behoof of the children, and the *lifereit* only for the father. If they had paid the sum to Hugh Seton, they would, as infringing on the trust, have been liable in damages to Archibald.

The Lords repelled the objection, and sustained Archibald Seton's claim.

Lord Reporter, *Swinton*.

For Archibald Seton, *Dean of Faculty*.

Alt. Solicitor-General, *Patison*.

Clerk, *Menzies*.

D. D.

N° XLV.

March 6. 1793.

SAMUEL PEAT,

A G A I N S T

The Reverend Dr JOHN SMITH.

PROOF.—DELINQUENCY.—*A proof of the veritas convicii limited to specific circumstances.*

MR PEAT having obtained a presentation to the parish of Gigha, in Argyleshire, was taken upon trials by the presbytery of Kintyre. As a great majority of the inhabitants of that parish understood Gaelic only, the presbytery thought it proper to examine Mr Peat on his knowledge of that language, particularly as he was born in the low country, and had resided there for the greater part of his life. This examination having been declined by the presentee, who alleged, that the presbytery had no right to insist on it, he was found by them not qualified to supply the vacancy.

Mr Peat appealed against this sentence to the synod of Argyle, which meets at Inverary, where Dr Smith was appointed by the presbytery to defend their judgment.

Mr

jected to punishment; Voet, *ad tit. de injur.* § 9.; Buller's introduction to the law relative to trials at *nisi prius*, p. 8.

Observed on the Bench: A proof of the *veritas convicii* can in no case be allowed in general terms. But as specific circumstances are here stated, they may, if proven, alleviate the offence, or altogether exculpate the defender.

The Court allowed the pursuer a proof of his libel in common form, but limited the defender's proof to certain specific facts stated by him as articles of charge against the pursuer.

Lord Ordinary, *Justice-Clerk.* Aft. Solicitor-General, Arch. Campbell, Connell, Fletcher.
Alt. Dean of Faculty and W. Robertson. Clerk, Sir James Colquhoun.

R. D.

N° XLVI.

March 7. 1793.

JOHN HOME, Writer to the Signet, Petitioner.

JURISDICTION.—FACTOR.

1. *The application of a curator bonis, for the sanction of the Court to ordinary acts of administration, is incompetent.*

2. *Borrowing money found to be an extraordinary act of management.*

THE late Sir Alexander Stirling executed a strict entail of the barony of Renton, and at the same time conveyed it to trustees for payment of an annuity to the widow and heir of the grantor, and for a variety of other purposes; in particular, it was declared, that the trust should continue till the debts upon the estate were paid.

The trustees having declined accepting of the trust, John Home, writer to the Signet, was appointed by the Court *curator bonis* upon the estate.

Some time after his nomination, he applied to the Court, 1st, For their authority to certain ordinary acts of administration, such as granting leases in terms of missives of the former proprietors, erecting buildings, and making improvements, &c. 2^{dly}, He stated, that the rental of the lands was inadequate to the yearly charges against them, arising from the payment of the annuities, interest of debt, and the expence of management. He therefore craved to be

allowed

allowed to borrow such sums of money upon the credit of the estate as should be necessary, in order to provide for the deficiency.

The Court considered both branches of the petition as falling within the ordinary powers of a *curator bonis*, and were of opinion, that it was not their province to superintend every common step taken respecting an estate under judicial management. They therefore refused the petition as incompetent.

Mr Home presented a petition, reclaiming against this interlocutor, in so far as the Court had thereby refused to interpose their authority to his contracting debt. He stated, that Sir Alexander Stirling, by his deed of trust, had allowed his trustees to borrow money only to pay off the principal sums of the debts upon the estate, in case they should be demanded before they could be paid out of the rents and price of woods, and had not provided for other exigencies, such as the present, which might equally demand the borrowing of money to a certain limited extent, in order to carry on the management. That this act of administration was therefore of an extraordinary nature, though in the circumstances of the case absolutely necessary; and consequently the warrant for it must flow from the Court, both for the sake of getting the money more readily, and in order to render it an effectual burden on the lands.

The Court in so far altered their former interlocutor, and granted this prayer of the petition.

For the petitioner, *Rolland, Cba. Hope.*

Clerk, *Home.*

R. D.

N^o XLVII.

March 8. 1793.

THE YORK-BUILDINGS COMPANY,

AGAINST

ALEXANDER MACKENZIE.

RANKING AND SALE.—*The common agent in a ranking is not disqualified from purchasing at the judicial sale carried on under his direction.*

ON the bankruptcy of the York-buildings Company, Alexander Mackenzie was appointed common agent in the ranking of the creditors on their estates in Scotland.

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In

In 1779, the lands of Seaton, belonging to that Company, were exposed to public sale, under the authority of the Court, when the common agent purchased the two first lots at the upset price.

A reduction of this sale was brought by the Company, on the two following grounds: 1st, That the defender, in consequence of holding the office of common agent, came under a legal disability of becoming the purchaser. 2^{dly}, The pursuers alleged, that certain circumstances of the defender's conduct, at and previous to the sale, amounted to fraud, or at least to culpable negligence, which, in his situation of common agent, must have the effect of setting aside the purchase. This second ground of challenge was a mere question of fact, and made the subject of a voluminous proof, in which the pursuers failed. In support of the first ground, which resolved into an abstract point of law, it was

Pleaded: 1st, By the act of sederunt 1756, which introduced the appointment of a common agent, and by the uniform subsequent practice, it is the duty of the person accepting of that office, to take a proof of the value of the estate, to bring it to public sale, and to ascertain the interest of each creditor in the price. In taking these steps, he acts not only for behoof of the creditors at large, but of the common debtor, who, as he has not access to his funds, is deprived of the means of protecting his own interest. All parties concerned are presumed to place implicit confidence in his integrity, for if they were to watch over every step of his management, they might as well conduct the business without his assistance. As therefore the common agent is in reality the seller of the estate, and as the duties of seller and buyer are inconsistent with each other, *Vinnius*, b. 3. tit. 4. he cannot be allowed to unite the two characters in his person.

2^{dly}, Besides, a common agent may also be considered as trustee for all concerned, and no trustee is allowed to purchase the subject of the trust, or at least if he does so, he is considered as holding it for behoof of the truster, that is, in the present case, for behoof of the pursuers and their creditors. This principle is recognised by the law of Rome, *ff. lib. 18. tit. 1. l. 34. § 7.*; *Matth. de Auct. p. 74.*; of England, *Abrid. Cases in Equity*, vol. ii. p. 741.; *Fox versus Mackreth*, stated in *Brown's Reports*, vol. ii. p. 420.; *Whelpdale versus Cookson*, anno 1747; *Vezey*, vol. i. 9. *Bovey versus Smith*; *Vernon*, vol. i. No. 58. and 139.; *Twining versus Morice*, anno 1788; *Brown*, vol. ii. p. 326.; and of this country, *Stair*, b. 1. tit. 6. § 17.; *Durie*, 28th February 1632, *L. of Ludquhairn*; 17th February 1732, *Cochran*, stated in *Dict.* vol. ii. p. 492.; *Kilkerran, voce Husband and Wife*, 19th June 1745, *Bee against Biggar*; *Kames*, 6th March 1767, *Earl of Crawford*, 26th June 1789, *Wilsons*.

3^{dly}, And even although a common agent were not, strictly speaking, vested with either of these characters, it would be *contra bonos mores* to allow a common agent to purchase at the sale, as it would be laying him under such temptations to conceal the value of the subject, and afterwards to conduct the sale of it improperly, as his integrity might in many cases be insufficient to resist.

Answered: 1mo, A common agent is no more the seller of the estate than the lawyer who appears at the different callings of the process of ranking, or any other person employed in forwarding the business. The sale is the act of the law, and if the character of a seller is at all essential to it, the Court itself, acting under the authority of the statute 1690, c. 12. can alone be considered as possessing it.

2do, The estates of the York-buildings Company were not conveyed in trust to the defender. His employment was limited to a particular purpose, namely, that of carrying on the process of ranking, and dividing the price among the creditors. He was therefore no more a trustee than a writer or solicitor, who is employed in any particular piece of business, who surely is not on that account disabled from purchasing the property of his employer.

But even if the defender could be viewed as a trustee in the strictest sense of the word, the purchase in question would not have been reducible on that account; for although a trustee cannot purchase the property of the trustor by private bargain, there is no reason for extending the prohibition to the case where the subject is sold by a public auction fairly advertised, when, in consequence of the competition of purchasers, there is no possibility of his having an unfair advantage. And this must particularly be the case where the auction is carried on under the superintendence of the Supreme Court, where, of course all the proceedings are attended with the most public notoriety. Accordingly, both by the civil law and our own, a tutor, who exercises the most sacred of all trusts, may purchase the goods of his pupil for his own behoof, when exposed to public sale; *l. 5. Cod. de Contrab. empt. ; Erskine, b. 1. tit. 8. § 19.* In like manner, a creditor *pignoratitius* in the Roman law obtaining the authority of a judge to sell a pledge by auction, for payment of his debt, might himself become the purchaser, *Voet. lib. 20. tit. 5. § 3.*

As to the authorities quoted by the pursuers from the law of England, they are either misunderstood, or do not apply to the present case. Indeed, it would seem, that the English are less scrupulous in this matter than we are in this country. By a late statute, 17 Geo. III. c. 20. it appears not only to be lawful for the proprietor exposing his goods by auction, either to bid himself, or to employ another to bid for him, but that he is even liberated from the duty on sales, if he become the purchaser.

3tio, Admitting for a moment, that it is *inexpedient* to allow the common agent to purchase at the sale, as the law has not declared his doing so *illegal*, it is not a competent ground of reduction; for, in order to found a right of challenge at common law, it is necessary to prove, not merely that the situation is suspicious, but that fraud has actually been committed. If in any case the temptation to over-reach, arising from the situation of parties, was a ground of reduction at common law, bargains between a member of the College of Justice and a litigant, concerning a depending law-suit, should have been reducible on that account; yet the Legislature thought a positive

tive enactment necessary to check this traffic ; and even still, as the statute has not annexed nullity, but deprivation of office, as the penalty of contravention, such transactions have uniformly been sustained ; Fountainhall, 20th December 1683, Purves.

Besides, from a search of the records, it appears, that since the year 1756, common agents have been offerers at judicial sales carried on under their direction in no less than 135 instances, in eighteen of which they became the purchasers, yet in no one case has this conduct been challenged, either on the head of fraud or legal disability ; a circumstance which shows not only that the practice is in favour of the defender, but that the suspicion arising from his situation is altogether groundless.

After a hearing in presence, the Lords “ repelled the reasons of reduction.”

But on advising a reclaiming petition, with answers, the Court, by a narrow majority, “ in respect Mr Mackenzie was common agent when the sale of the two lots of Seaton in question took place, reduced the said sale.”

The pursuers not being satisfied with the *ratio decidendi* of this last interlocutor, both parties reclaimed ; and on advising the mutual reclaiming petitions, with answers and minutes, several Judges observed, that a common agent had such advantages over other bidders, both in obtaining better information, and in other respects, that he ought not to be allowed to purchase : That as a lawyer cannot act for both parties, so neither can a common agent do justice both to the creditors, and to himself, if he intended to become the purchaser : That although he was not disabled by any municipal regulation, yet his disqualification was founded on reason : That the circumstance of so many common agents having been offerers at sales, was an additional ground of suspicion, and shewed the necessity of excluding them. And as the rule is universal, that no trustee can take advantage of a sale in his own favour to the prejudice of the truster, so neither can a common agent, whose situation in that respect must be considered as precisely similar.

On the other hand, a majority of the Court were of opinion, that although it might be proper that an act of Parliament, or act of federunt should be made, prohibiting common agents from becoming purchasers in future ; yet as at present they are under no legal disability, it would be equally contrary to justice, and to the principles of our law, to give a retrospect to such a regulation : That an apparent heir purchasing adjudications by private bargain, would not have been subjected in a passive title, previous to the act 1695, c. 24. nor would a factor on a sequestrated estate buying a debt affecting it have been considered as entering into an illegal transaction before the act of federunt, 25th December 1708. And that the sale in question was valid on the very same

N° XLIX.

May 15. 1793.

ATTORNEY of Thomas Cullen and Company,

AGAINST

DAVID PHILP.

PACTUM ILLICITUM.—*A merchant settled abroad, whether a foreigner or a native, who is accessory to smuggling goods into this country, bas no action for the price of them.*

THOMAS CULLEN and Company, merchants at Ostend, had been in the practice of supplying David Philp at Boarhills in Fifeshire with contraband goods, sometimes on commission, and sometimes at shore price, that is, a price payable on delivery of the goods in Britain, and sufficiently high to insure the vender against the risk of seizure.

Captain Oldfield always had the charge of the vessels employed by Cullen and Company on these occasions. By a letter from Cullen and Company to Philp in January 1789, they informed him, that Oldfield was to sail in a few days from Ostend, with a quantity of gin and brandy; that he meant first to call at Boarhills, when he expected Philp would be prepared for him, and assist him in the disposal of the cargo.

The letter was so expressed as to leave room for arguing, that the goods were the property of the captain.

Oldfield accordingly arrived at Boarhills soon after. Philp agreed to take a considerable quantity of the cargo, and accepted bills for the price, payable to Thomas Potts, nephew to Thomas Cullen, who acted as supercargo on this occasion. The greater part of the goods were seized in the landing.

The bills were indorsed to Sir William Forbes and Company, for behoof of Cullen and Company, to whose account they were immediately placed; and Philp being charged for payment by their attorney, brought a suspension, in which

Both parties agreed, that on the principles established by the case of Cantly, 11th February 1790, and others, if Cullen and Company were accessory to the smuggling, no action could lie; and the one endeavoured to establish the accession by the evidence in process, and the other to show that there was none.

The Court were of opinion, that this adventure was just a continuation of the former illicit trade, and that the interposition of Oldfield was intended merely as a cover to the real transaction, and unanimously adopted the following distinction.

When a merchant settled abroad, whether a foreigner or native of this country, simply sells goods to a smuggler, *tanquam quilibet*, and makes delivery on the spot, he can maintain action for them in our courts, though he suspected, or even knew that they were meant to be smuggled into Britain; but if he is accessory to the smuggling, and thereby to an infringement of the laws of this land, (which he is bound to know as far as concerns his trade), he cannot demand the aid of the British courts for recovery of his debt. And this, (it was observed), was not a new doctrine, but established before the case of Cantly, by that of Sibbald against Wallace, in 1779*.

The Lords suspended the letters *simpliciter*.

On a motion for expences by the counsel for Philp, it was observed, that the principle of the judgment was *in turpi causa melior est conditio possidentis*, and therefore that no expences ought to be awarded.

Lord Reporter, Stonefield.
Alt. David Catbcart.

Act. Dean of Faculty, W. Murray.
Clerk, Home.

D. D.

N^o L.

May 15. 1793.

REID and PARKINSON,

AGAINST

JAMES MACDONALD, JOHN ELDER, and others.

PACTUM ILLICITUM.—*The same point.*

MESSRS Kirkpatrick and Company, natives of Scotland, settled at Ostend, had been in the practice of carrying on an illicit trade with persons in this country, and, in particular, had formerly been engaged in a smuggling adventure with Macdonald and Elder of Inverness, and others. In spring 1790, Macdonald, &c. having embarked in a new scheme of the same nature, transmitted bills, for the price of the goods to be furnished, to Messrs Kirkpatrick and Company. These dealers at first undertook the commission, but afterwards declined executing it, on account of the disagreeable consequences (as they said) with which such adventures are attended, alluding to the late cases where action had been refused. They, however, recommended a person whom they called

* Not collected.

ed Bonaventura Gibert, a Spaniard, as fit to be trusted with their business. He having accordingly (as it was said) furnished the goods, the bills were transferred to him.

Elder, one of the Inverness merchants, was at Ostend when the ship was loaded. The vessel, which belonged to Macdonald and Elder, was cleared for North Faro, although the Isle of Sky was its real destination.

Kirkpatrick and Company, after declining the commission, continued to furnish the Captain with necessaries for himself, and to advance him money for the repairs of the ship.

The goods arrived, but in a damaged state.

The bills were indorsed by Gibert to Reid and Parkinson, for behoof of Kirkpatrick and Company, without value. The accepters being charged for payment, raised two suspensions, and

Pleaded : It is evident, from the correspondence and circumstances of the case, that Gibert was the clerk of Kirkpatrick and Company, who were accessory to the smuggling, and acted as agents for the suspenders.

Answered : There is no evidence that Gibert was connected with Kirkpatrick and Company, and if he had, as the goods were furnished to the agent of the suspenders, who was on the spot, and were by him put on board a vessel which was not the property of the chargers, and as they had no concern in the after proceedings, it would be contrary to the principle of former cases, and the opinion of the Court in the case of Cullen and Company against Philp, to deny action for the price.

The Court were satisfied, from various circumstances of evidence, that Gibert was a clerk of Kirkpatrick and Company, and a person interposed by them to cover their own concern in the transaction. Gibert's letters, in particular, were held to be evidence of this, being in the same hand with Kirkpatrick's, and shewing a thorough acquaintance with the English language. The Judges, in general, were also of opinion, that Kirkpatrick and Company, by their advance of money for the vessel, the false clearances, and their delivery of the goods on board the vessel, had acted as agents for the business, and become participant of the smuggling. Some were at first moved by the circumstance of Elder being on the spot, at the loading of the vessel, and held, that the evidence of accession was defective. But, in the end, an unanimous judgment on the above grounds was given.

The Lord Ordinary had 'suspended the letters *simpliciter*.' The Lords "adhered;" and on 30th May 1793, refused a reclaiming petition without answers.

Lord Ordinary, *Dregborn*.
Clerk, *Sinclair*.

Aff. *Geo. Fergusson*.

Alt. *Ja. Grant, Cha. Hay*.

D. D.

Pleaded: By the act last mentioned, it is declared lawful to his Majesty to grant to their former proprietors "all and every the" lands, lordships, baronies, fishings, and other *like heritages* "which became forfeited, and which *were annexed to the Crown*" by the 25th of the late King. The annexing and restoring acts are thus commensurate, and nothing is restored that had not been annexed. But from comparing the terms of the vesting and annexing acts, it is evident that this lease was not annexed.

By the former it is declared, That "all and every the lands, heritages, debts, or sums of money, and goods and chattels whatsoever; and generally, the estates, goods, and effects, heritable and moveable, real and personal, descendible to heirs, executors, jurisdictions, liferent-rights, or of what nature or kind soever they be," &c. belonging to persons attainted on account of the late rebellion, shall be forfeited. A lease of teinds was undoubtedly comprehended in this description.

By the annexing act it is declared, "That all and every the lands, lordships, baronies, patronages, tithes, fishings, and *other like heritages*, which became forfeited," &c. "as the same," &c. "are more particularly enumerated and described in the title-deeds, rights, and infeftments of the said attainted persons, or their predecessors, or in the surveys already taken, or hereafter to be taken thereof by the Barons of Exchequer in Scotland, in pursuance of the powers given to them by the aforesaid act of the 20th of the King," &c. shall be annexed, and remain for ever unalienable, &c.

It is evident, therefore, that the annexing was meant to be much more limited than the vesting act. Heritable rights alone are annexed; and even those only of a certain description, *viz.* absolute rights of property, and of a permanent nature. The Legislature must have meant to exclude such as were limited or temporary only. It was on this account that liferent, one of the most important feudal rights, is specified in the vesting, but omitted in the annexing act. For the same reason, leases were not annexed. Indeed, the phrase, "remain for ever unalienable," is quite inapplicable to any lease, and especially to one which had but a few years to run.

This opinion is confirmed by the conduct of all concerned, only five years after the act was passed. The teinds had at first been surveyed under direction of the Commissioners of annexed estates, in the belief that the Earl of Cromarty enjoyed an heritable right to them: But as soon as it was known that he only held them by a lease, they were immediately withdrawn from their management, and leases granted to the heritors, upon the same terms as if no lease had existed.

Answered: The restoring act refers to; and proceeds upon, both the vesting and annexing acts; and therefore both are comprehended under it.

Indeed, the annexing was meant to be equally broad with the vesting act. The former takes no notice of moveable property, because in no one instance were the moveable funds of the forfeited

feited person sufficient to pay his debts; but it is impossible to imagine any heritable right which it does not include. The lease in question was a right of tithes; it came under the class of "other like heritages;" and it was surveyed by the Barons of Exchequer. If after the date of that act it had been the subject of enquiry, whether the estate of Cromarty was sufficient to pay the debts of the Earl, this lease, which was to last for 170 years, would have been included in the calculation.

The lease to Sir John Gordon was meant as a favour to his sister, and was granted without examination.

A great majority of the Court, convinced by the arguments stated for Mr Mackenzie, concurred in finding, "That the tack of tithes in question was annexed to the Crown, and restored to the family of Cromarty." Some other points in the cause were remitted to the Lord Ordinary.

A reclaiming petition was refused, without answers, on the 5th June 1793.

Lord Reporter, *Craig.* A&C. Solicitor of Tithes *Balfour, M. Ross.* Alt. R. *Craigie.*
Clerk, *Menzies.*

D. D.

N^o LII.

May 16. 1793.

JOHN URE, and other Heritors within the Royalty of the Burgh of Forfar,

A G A I N S T

PATRICK CARNEG Y, and others, Heritors of the Landward District of the Parish of Forfar.

KIRK.—*The area of a new church in a parish where there is both a royal burgh and a landward district, falls to be divided between them in proportion to their population.*

THE parish of Forfar is composed partly of the royal burgh of that name, and partly of a landward district. The number of examinable persons within the burgh and lands holding of it amount to 2965. The country district contains 765.

The old parish-church having become ruinous, a new one was built, and an action was brought by some of the burgh heritors, in order to ascertain the manner in which its area should be divided.

The pursuers contended, that the church should be divided between the burgh and the landward district, in proportion to their respective

respective population. The country heritors, on the other hand insisted, that the area should be divided equally between the burgh and themselves, and that their half should be subdivided in proportion to their valuation.

It was understood, that the expence of building the church was to be defrayed according to the extent of area which each party should ultimately obtain.

The leading arguments on both sides were the same in substance with those stated in the report of the case of Crieff Fac. Coll. 20th November 1781, and need not be here repeated.

The defenders likewise founded on a decree-arbitral in 1759 relative to the building a schoolmaster's house, and repairing the church, whereby it was declared, that in future the expence necessary for these purposes should be equally defrayed by the burgh and landward district; and it was contended, that this afforded evidence of the practice in bearing public burdens, and that therefore the benefit arising from them should be divided in the same proportions.

The Lord Ordinary reported the cause on informations.

One of the Judges, influenced by the practice of the parish in paying parochial assessments in other cases, thought the area should be divided equally. The rest of the Court, however, were clear, that where a considerable town makes part of a parish, from the very nature of the thing, the division must proceed on the *ratio* of population. They considered this point as fixed by the decision in the case of Crieff above mentioned, and in those of Campbeltown in 1774 and 1775, and St Andrew's, 25th May 1791*.

It was accordingly found, "That the area of the church in question must be divided betwixt the heritors in the landward part of the parish and the burgh of Forfar, in a proportion effecting to the number of the parishioners in each, and that the expence of the building must be defrayed by the burgh of Forfar, and the landward part of the parish, in proportion to their respective shares of the area."

Lord Ordinary *Henderland*.

A&C. *M. Ross, Jo. Millar junior*.

Alt. *Craigie*.

R. D.

* The two last not collected.

May 1793.

COURT OF SESSION.

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N° LIII.

May 17. 1793.

FRANCIS PINKERTON DRUMMOND,

A G A I N S T

WILLIAM ABERNETHY DRUMMOND, MARY OGILVIE,

A N D

Her HUSBAND, for his interest.

INFESTMENT.—A charter containing an erroneous destination, must be interpreted according to its warrant.

PRESCRIPTION 1617, c. 13.—Does the vicennial prescription apply where the lawful heir has been irregularly served?

CONFIRMATION.—Must a charter of confirmation mention the deeds confirmed?

WILLIAM DRUMMOND elder of Hawthornden, in the marriage-contract of his only son William, in 1722, became bound to infest his son, and the heirs-male of his body; whom failing, the heirs-male of his own body; whom failing, the heirs-female of his son's body; whom failing, the heirs-female of his own body, &c. in the lands of Hawthornden, and others.

The contract contained procuratory and precept. Upon the precept William the son took a base infestment in 1723, and in 1724 he executed the procuratory, by resigning the estate into the hands of the Barons of Exchequer. The instrument of resignation, and the signature authorizing a charter, were both in the precise terms of the substitution in the marriage-contract. But by a mistake in translating the charter, its dispositive clause bore, that the lands were to devolve to William Drummond, younger of Hawthornden, "et hæredibus suis masculis, quibus deficientibus masculis, dict. Gulielmi Drummond senioris: quibus deficientibus femellis dict. Gulielmi junioris quibus deficientibus." &c. whereas, in conformity to the contract, the words *de corpore*, ought to have been added to each substitution.

To this charter a general clause was subjoined, confirming "omnia jura et evidentia per quoscunque fact. et concess. in favorem dict. Gulielmi Drummond junioris, ejusque prædict. eorumque authorum, et predecessorum quæ ad dict. terras aliaque supra mentionat. pertinent." &c.

Upon the precept in this charter William the younger was immediately infest. His seisin recited the clause of destination in the same erroneous manner with the charter, and he possessed up-

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on these titles till his death in 1760, when (there being no heirs-male of the body of William the elder) Mary Barbara Drummond, his only surviving child, soon afterwards married to Dr Abernethy, was of course entitled to succeed in terms of the marriage-contract.

The blunder in the charter was then discovered, and in order to correct it, she, without making up titles, brought an action of declarator and reduction, which concluded, *1mo*, That it should be declared, that the mistake in the charter should not affect her right, but that the substitution should proceed in terms of the marriage-contract, and that warrant should be given to the proper officers to alter the record; or, *2do*, That the charter should be set aside *in toto*.

- In this action the Court did not reduce the charter, but found it erroneous, and that the pursuer was entitled to serve herself heir of provision in special to her father, in the same manner as if the charter had been properly expedite; Kames's Select Decisions, 27th February 1761.

Mrs Drummond was so served and retoured accordingly, in March 1761. She immediately took infeftment upon a precept from the Chancery, proceeding on the retour of her special service; and at the same time, left in consequence of his base infeftment, the *property* should be considered as *in bare ditate jacente* of her father, she, *qua* superior, granted a precept of *clare constat* in her own favour, and on this she was also infeft. And she afterwards resigned *ad remanentiam* in her own hands.

Mrs Drummond executed different deeds affecting the estate, and, in particular, after the death of her only child, a disposition in favour of her husband in liferent, and Mary Ogilvie, a distant relation, in fee.

Mrs Drummond died in 1789.

The heir at law under the marriage-contract brought a reduction of the charter 1724, the decree of declarator, Mrs Drummond's service and retour, and of the subsequent deeds she had executed, and

Pleaded: The charter granted in 1724, as being inconsistent with its warrant, is no doubt liable to reduction; but while unreduced, it excludes Mrs Drummond from the succession. She therefore died in apparenacy, and her service and subsequent gratuitous deeds are inept.

The decree in 1761 is also nugatory, the judgment being such as the Court had no authority to pronounce; for though they may reduce the titles to a landed estate, they cannot, without doing so, allow them to be disregarded.

Answered: A total reduction was unnecessary. The charter was faulty only in one particular, which the Court did no more than explain, according to the warrants on which it proceeded.

The defender further stated the following defences, unconnected with the decree in 1761, and

Pleaded: 1mo, Mrs Drummond was served heir in 1761. Her retour is therefore secured from challenge by the vicennial prescription 1617, c. 13.

2do, By the clause of confirmation in the charter, Mr Drummond's base infeftment became public. His infeftment therefore upon the charter, together with the precept of *clare constat* and the resignation *ad remanentiam* executed by Mrs Drummond were unnecessary.

3tio, Mrs Drummond was a creditor under the marriage-contract, whom her father could not gratuitously disappoint; Dict. *voce* Provision to Heir and Children, November 1717, February 1718, Fea against Trail, 15th June 1710, Leslie against the Creditors of Leslie. If he has not fulfilled his obligation so as to entitle her to carry the estate by a special service, as heir of provision, that service, as including a general one of the same description, was at least sufficient to enable her to transmit her *jus crediti*.

Answered: 1mo, Before the statutes 1494, c. 57. and 1617, c. 13. no lapse of time prevented the legal heir from asserting his right. By the former, it was enacted, that after three years, by the latter, that after twenty years, from the date of the service, the person served should not be disturbed at the instance of the legal heir. Both apply only to the case where there is a competition between the person actually served, and him, who, had he claimed in proper time, was alone entitled to have been so; Bankton, b. 3. tit. 5. p. 353.; Erskine, b. 3. tit. 7. § 19. In the present case there was no competition: While Mrs Drummond was alive, no person had an interest to challenge her service; and as she herself might have brought a reduction of it after twenty years, 11th July 1701, Lady Edinglassy, so may the pursuer.

2do, The few general words thrown in at the end of the charter of resignation, cannot be presumed to confirm an infeftment not specially mentioned. The charter 1724 has all along been considered as a charter of resignation.

3tio, As the marriage-contract was carried into effect, by an actual conveyance of the lands upon which infeftment has followed, there remained no *jus crediti* in the heirs of the marriage, which could be transmitted without a special service; 9th March 1757, Livingston against Lord Napier; 9th December 1760, Porterfield against Gray; 21st July 1676, Hay against the Earl of Tweeddale; 23d February 1682, Clerk against his Sisters and David Forbes; 28th November 1684, Irvine against Macitrack; 26th July 1715, Lyon against Garden; 27th December 1716, Mackintosh against Laird of Aberairder.

Replied: 1mo, It would be singular if Mrs Drummond, whose right is not alleged to have been defective, except in point of form, should be in a worse situation than a person not entitled to succeed.

ceed. The statutes make no such distinction. The passage from Mr Erskine, founded on, relates to the case of an heir wishing to set aside his own service, where it has very properly been found, that the vicennial prescription does not run against him.

2do, It is not necessary that a charter of confirmation should mention the deeds confirmed. The infeftment on the contract was a "right and evident" in favour of William Drummond, and therefore was included in the general clause of confirmation.

The Lord Ordinary ordered informations; upon advising which,

The Court were unanimously of opinion, that the decree pronounced in 1761 was liable to no objection; that even if no process had been brought, the charter in 1724 must have been interpreted according to its warrant, the discrepancy between them having arisen merely from a mistake, and that therefore Mrs Drummond's return and subsequent deeds would have been effectual.

The Court had therefore no occasion to give a special judgment upon the separate defences; but it was observed, that the vicennial prescription does not apply to the case of inaccuracies in the service of the true heir, and that the charter 1724 was truly a charter of confirmation, and effectual as such, though it did not specify the deeds confirmed. The after infeftment, as on resignation, was therefore useless.

It was further observed, that as the contract of marriage contained a disposition of the lands upon which infeftment had followed, there remained no personal *jus crediti* in the heir of the marriage, which could be carried without a special service.

The Lords repelled the reasons of reduction.

A reclaiming petition was refused without answers on the 6th June 1793.

Lord Reporter, *Dregborn.*
Alt. Solicitor-General.

A&C. Dean of Faculty, *Honyman.*
Clerk, *Menzies.*

D. D.

Answered: Any statute which alters the ordinary course of law, must be strictly interpreted. This statute applies only to the direct damage sustained by the owners, proprietors, or occupiers of springs, or by those through whose grounds the pipes are carried, and not to the consequential loss which may arise to inferior heritors. This claim is therefore cognizable in the ordinary courts, and in course of the ordinary process of law; and if the pursuer's action of relief were sent to a jury, and a different court from his tenant's action of damages, that court and jury might not give him relief equal to the damages awarded against him in this Court.

The Lord Ordinary reported the cause on informations.

The Court differed in opinion on this question. Some Judges thought this case came under the act; but a majority were of opinion, that whatever the purpose of the Legislature might have been, yet the words of the statute were not such as clearly reached the present case of consequential damage, and that the jurisdiction of the ordinary courts of law was not to be excluded by implication.

The Lords "repelled the objection to the competency of the action."

Lord Reporter, *Henderland*.
Clerk, *Gordon*.

A. & *Elphinston*.

A. & *McCormick*.

D. D.

judges shall not be subject to review, the jurisdiction of the superior courts is in use to be expressly excluded; Erskine, b. 1. tit. 2. § 7. Of this, many instances might be given from English statutes, and from the revenue-laws in Scotland. See also 13 Geo. I. c. 26. § 31. and 23 Geo. II. c. 17.

The jurisdiction of the Court of Session is not excluded by the act now in question; by the expression "final and conclusive," nothing more is meant than that a judgment of the quarter-sessions should, *quoad* them and the trustees, have the effect of a *res judicata*, so as to prevent the repeated introduction of the same subjects of controversy *in their court*; but without excluding the means of relief to those aggrieved, by complaint to the Court of Session, and by appeal from them to the House of Lords.

In a question on the act 1 Geo. I. c. 18. which authorizes the Justices of Peace "finally to determine" certain points, it was found, that the jurisdiction of the Court of Session was not excluded; 10th March 1754, Buchanan against Touart. Upon these principles, it has been found, both in England and Scotland, that an appeal lies to the superior courts from the sentences of the commissioners acting under the comprehending acts, although they enact, that no person enlisted in consequence of them, "shall be liable to be taken out of his Majesty's service, by any process, other than for some criminal cause;" 18 Geo. III. c. 53.; 19 Geo. III. c. 10.; 13th June 1758, Rex against Thomas Dawes, and Rex against Kesel; Burrow, Vol. i. p. 636. 637; Letter of Lord Ashburton, 25th June 1779, Patullo against Sir William Maxwell, and 10th August 1780, Cooper against Ogilvie*.

2do, At any rate, relief must lie by application to this Court, where the trustees have exceeded their powers. The road in question does not fall under the description of a by or secondary road, but is a public cross road, which passes between other two not otherwise connected, and one which a solemn judgment of the Court, pronounced in 1782, declared to be of importance to the public.

Answered: The words employed in the statute are not naturally, nor with any propriety, susceptible of any meaning but this, That the judgment of the quarter-sessions shall not be subject to review; and the same terms have been so construed, when used in other statutes; *e. g.* in the statute, 20 Geo. II. c. 43. which introduces the power of appeal in civil cases to the Judges of Justiciary on their circuit, and declares that their judgments shall be final.

The argument of the complainers confounds two enactments which are distinct. Where a statute says that the Judge "shall finally determine," it only means to prescribe, that the cause shall not be removed out of his Court till he has given his definitive judgment. Thus, by 1663, c. 9. no cause for a sum under 200 merks, and which by 20 Geo. II. c. 43. is extended to L. 12 Sterling, can be brought by advocacy before the Court of Session. Such cases,

therefore the inferior judge must "finally determine;" but it does not follow, that his judgments are "final and conclusive," which they can only be if the cause is not in any court liable to be reheard.

But even if the expressions used were equivocal, this would not be decisive of the question. The statute bestows a new jurisdiction; and in all such cases, it is to be considered whether the matter to which it relates is one in which the ordinary courts already enjoyed a jurisdiction, or, on the contrary, is created by the statute itself. In the one case, the presumption lies *in dubio* for the power of review, and in the other it lies against it. The statute then does not derogate from the jurisdiction of the ordinary courts, and there is no reason why a new branch of jurisdiction should be given to these courts by implication. The argument will be the stronger, if the statute relate solely to a matter of police, or to such a thing as is of more suitable discussion for a jury of neighbours than for a court of law; Hist. Law Tracts, vol. i. p. 422.; Erskine, b. i. tit. 2. § 7. which is precisely true of a turnpike-act.

In England, the courts at Westminster never review the proceedings of particular jurisdictions introduced by statute, unless where it is alleged that the Judge has exceeded his powers; Raymond, Report 580.; Viner, *Certiorari*, p. 334. 336.

The Court of Session has adopted the same principle, in questions both on the turnpike and comprehending acts; 1st February 1757, Trustees, &c. against the Magistrates of Perth; 18th January 1764, Russell and others against Trustees, &c.; 9th August 1778, Foote and Marshall against Steuart; 25th July 1744, Robertson, Dict. vol. iii. p. 193.; 27th July 1781, Earl of Galloway against Hawthorn; 1777, Andrew against Dalrymple*. In the cases of Patullo, &c. the Commissioners had exceeded their powers.

2do, Every turnpike-act considers all the public roads in a country to be either turnpike-roads or by-roads. With private roads, such as the avenues to gentlemen's houses, it has no connection. The road suppressed therefore being a by-road, the trustees, who were not parties in the former action, are the only competent judges of its utility.

Replied: In some respects a turnpike-act does introduce new objects of jurisdiction, such as the direction of the roads, or the situation of the toll-bar; and in these points there may be more room for argument against the power of review. But this Court has a radical jurisdiction with respect to roads, wherever private right is concerned. It is acknowledged the trustees cannot shut up a private road, it would therefore be singular, if they could shut up one, which a final decree of this Court has declared to be beneficial to the public.

The Court were of opinion, that the judgments of the quarter-sessions were not liable to review in such points, as fixing the line of road, or the position of the toll-bars, which were discretionary in their

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* The two last not collected.

their nature, and in the exercise of the powers exclusively committed to the trustees. But it was on the other hand agreed, that a right to review, in case of the smallest excess of power, was essential, and was not excluded by the words of the act. It could not be supposed, (it was observed), that the trustees or Justices were meant to be themselves the sole and exclusive judges of the extent of their own powers, or that such a jurisdiction, which might even be held to be in some measure unconstitutional, was intended to be given. In this way the question of competency came to be blended with the question of merits; and with respect to this last, the Court were clear that the trustees had done wrong, in shutting up a road as a by-road which had, by a judgment of the Supreme Court, been found a public and useful road to the country; and that as in doing so, they had exceeded their powers, their judgment was liable to review.

The very same rule (it was said) would apply to questions which might arise out of the comprehending acts; as if the Justices should comprehend a physician, a lawyer, or a judge. The case of Marshall was indeed decided on other notions, but was immediately set aside by the judgment in the later one of Cooper, &c. where the point was fully considered.

The Court unanimously “advocated the cause, found that the
“road in question cannot be legally shut up, found the respon-
“dents (trustees) liable to the petitioners (complainers) in the full
“expence of extract, and that they are not at liberty to charge
“the expences incurred by them in this process, to the public
“funds of the county.”

Lord Ordinary, *Justice-Clerk.*
Alt. *Dean of Faculty, Tait.*

For the Complainers, *Lord Advocate, Geo. Fergusson.*
Clerk, *Sinclair.*

D. D.

N° LVI.

May 28. 1793.

The INCORPORATED TRADES of Aberdeen,

A G A I N S T

The MAGISTRATES, COUNCIL and GUILDRY
of said City.

BURGH ROYAL.—*Members of the Incorporated Trades are entitled to import the materials of their several trades, and to export the produce thereof; but they have no right to deal as merchants in the native commodities of England, nor to import from that country made goods of those kinds which they manufacture.*

SEVERAL questions having arisen between the Guildry of Aberdeen and the Incorporated Trades about their respective privileges, the latter brought an action of declarator, which contained, *inter alia*, the two following conclusions:

1mo, “That the freemen of the incorporated trades, or tradesmen burgeses of Aberdeen, present and to come, are entitled and at liberty to carry on within said burgh their several and respective trades, crafts and manufactures, and to import the materials of the same, and to export the produce thereof.”

2do, “That they are entitled to deal in, buy, and import all native commodities, goods or wares whatever, without exception, whether the produce of that part of Great Britain called Scotland, or that part thereof called England, or of the dominions, colonies, plantations and dependencies belonging to our Crown, or which hereafter may belong to the same.”

In support of the first conclusion, the pursuers

Pleaded: Originally all burgeses of royal burghs were equally entitled to carry on trade, whether foreign or inland, and craftsmen might even have been members of the Guild or Merchant Company, *L. L. Burg.* cap. 99. 119. 137. 138. and 139. *Statuta Gildæ*, cap. 25. *et passim*. *Iter Camerarii*, cap. 21. § 2. In England the privileges of trade were also conferred of old on the whole citizens. Brady, Appendix, p. 26; Burrows, p. 1322, *Racks versus Chamberlain of London*. Even in the year 1284, guilds in Scotland had acquired few exclusive privileges, Stat. Gild.

Gild. cap. 20. : indeed in those early periods of society, few persons could live solely by merchandise.

By 1457, c. 67. and 1466, c. 13. both of which are now defunct, it is ordained, that no person shall deal in merchandise without a certain stock. And the statute 1466, c. 12. contained a general enactment, prohibiting the members of the crafts from dealing in merchandise; Sir George Mackenzie, (vol. p. 198.) however, understands this law to relate only to foreign trade, and is of opinion, that the act 1661, c. 47. was merely intended as a renewal of it. Now, this last mentioned statute discharges all tradesmen and mechanics to import from foreign parts any *made work* belonging to that trade or calling where they are freemen, or to vend the same, or any such work brought home by merchants in their ships, or otherwise. From which it is evident, that the members of the crafts were still at liberty to import the raw materials of their respective trades.

The act 1672, c. 5. limits the exclusive privileges of freemen of royal burghs, even in foreign trade, to the importation of certain articles, "and declares it lawful to any of his Majesty's subjects to export all the native commodities of the kingdom;" and adds "that it shall be lawful to the burghs of regality and barony by any of their burghesses or members of society, to export their own proper manufacture, or such goods as shall be bought by them in fairs or markets; and that it shall be lawful to the said burghs of regality or barony, or societies erected or to be erected for manufacturies, and all others exporting the native goods of the kingdom, as aforesaid, to import in return of the goods exported, or of the freight and hyre of the ships, such goods and commodities following, viz. Timber, iron, tar, flint-seed, hemp-seed, hemp, onions, or other necessaries for the use of their fore-said manufactures."

And by the statutes 1690, c. 12. and 1698, c. 19. the privileges of home and foreign trade, so far as thereby conferred on royal burghs, are clearly understood to belong to every freeman bearing scot and lot, whether he be a craftsman or guild brother.

The demand of the pursuers is not opposed by the authority of any writer on the law of Scotland; and the only decision which has any connection with the subject is strongly in its favour. 8th July 1752, Corporation of Coopers of Perth against Kinnear and Company.

2do, That the pursuers are entitled to deal in the native commodities of Scotland is expressly declared by the statutes 1690, and 1698; and by the 4th article of the Union between Scotland and England, every person who had formerly a right of carrying on domestic trade in either country, obtained the same privilege in both; 16th December 1757, Smith against the Guildry of Inverness.

In point of expediency there can be no doubt, that both the present claims are well founded, as every restraint on domestic trade is detrimental to the prosperity of a mercantile country

“ respective trades, crafts, and manufactures, and to export the
 “ produce thereof; and decern and declare accordingly: Find,
 “ in regard to the conclusions of the libel as to foreign timber
 “ and salt, that the decreet-arbitral * must be the rule betwixt
 “ the parties; and remit to the Lord Ordinary to ascertain what
 “ is the use and wont respecting foreign timber, referred to in
 “ the said decree-arbitral; remit also to his Lordship to hear
 “ parties procurators further upon the conclusion of the decla-
 “ rator respecting shore-dues, &c. and assoilzie the defenders
 “ from the other conclusions of the libel.”

Both parties reclaimed against this interlocutor. The reclaiming petition for the defenders, praying that the crafts should be prohibited from importing the materials, and exporting the produce of their labour, was refused without answers.

The petition for the crafts was ordered to be answered. In this paper they prayed, That if they had no right to trade in all the native commodities of the united kingdoms, they should at least be allowed to import made work from England, of the kinds which they were entitled to manufacture. Without this power, they alleged that they could not have a proper assortment of the articles necessary for their several trades. And they now, for the first time, contended that the act 1661, prohibiting the importation of made work, was in desuetude. To establish this, they offered to undertake a proof, that by the uniform and immemorial practice not only of Aberdeen, but of all the other burghs in Scotland, craftsmen have constantly imported, without dispute, such articles of made work as fell within the proper business of their several crafts.

On advising this petition, with answers, it was

Observed on the Bench: The act 1661 stands unrepealed, and a statute which introduces a general regulation that may still be enforced, consistently with the situation and manners of the country, cannot go into desuetude. The object of the pursuers is to be merchants in their own trades, while they enjoy exclusive privileges as manufacturers.

The Court accordingly, on this point, “ adhered to the interlocutor reclaimed against, and refused the desire of the petition.”

Lord Ordinary, *Eskgrove*. A&C. *Maconochie*, M. Refs. Alt. Solicitor-General, *Burnet*.
 Clerk, *Sinclair*.

R. D.

N° LVII.

* This decreet-arbitral was pronounced in 1587, on a submission between the Guildry and the Crafts, and afterwards ratified by Parliament.

Pleaded: The bond of relief must be considered as of the same date, and as *pars ejusdem negotii* with the principal obligation, as a *novum debitum*, and not a farther security for a debt already contracted. Indeed, if Brough's credit had been suspected, which could be the only reason for demanding an additional security, infestment would certainly have been taken the moment the bond was granted. Now, the act 1696 strikes only at securities for prior debts. It was intended to remedy the defects of the act 1621, and prevent all partial preferences of creditors, but not to deprive a person on the eve of bankruptcy of the free administration of his affairs. A person the day before his failure may sell his property for an adequate price, may borrow money, and grant heritable securities; and surely therefore there can be no objection to the validity of a security granted many years before, though infestment has not been taken till within sixty days of bankruptcy.

The clause in the statute, declaring, that heritable rights shall be held as granted of the date of the seisin taken on them, does not apply to *nova debita*; for if it did, this preposterous consequence would follow, that a security obtained for such a debt on the sixty-first day before bankruptcy, and seisin taken on it upon the fifty-ninth, would be null, while a bond and seisin both within sixty days would be sustained.

The defenders admit, that an explanation different from that which they have now given, was put on the act 1696, in the case of Grant in 1717, and in that of Merchiston's creditors in 1731; but the doctrine now contended for was established 19th January 1726, Chalmers against the Creditors of Rickarton; 29th January 1751, Johnston against Burnet and Home. See also 20th February 1772, Houston and Company against Stewarts; 19th November 1783, Spottiswoode against Robertson Barclay.

Answered: The objecting creditors have no occasion to dispute that the act 1696 has been found not to apply to *nova debita* properly so called. But the bond of relief to Messrs Duncan and Jollie, granted several weeks after the date of the original obligation, falls not under this description. It is in the strictest sense, a further security for the debt which the bankrupt owed them from the moment they became his cautioners.

But further, the security in question would have been reducible, although it had been granted of the same date with the obligation to the bank, because infestment was not taken upon it for three years after, and not till within sixty days of the bankruptcy of the debtor. The danger of supporting such transactions is evident. By means of them, a tradesman, after burdening his heritable property to its utmost value, may carry on extensive dealings, and maintain his credit, on the supposition that it is quite clear of incumbrances, till at last he becomes completely ruined, when, and within sixty days of his bankruptcy, seissins are taken upon latent bonds, which entirely exhaust the subject; 19th June 1731, Creditors of Merchiston against Charteris; 25th November 1735, Trustees of Mathieson's Creditors against Smith, Dict. vol. i. p. 86.

N° LVII.

June 5. 1793.

The TRUSTEE for the Creditors of John Brough,

A G A I N S T

GEORGE SPANKIE and JAMES JOLLIE.

BANKRUPT. Act 1696, c. 3.—*An heritable bond of relief, upon which an infeftment had not been taken till within sixty days of bankruptcy found to fall under that statute, although in implement of an obligation in writing, granted at the time the original debt was contracted.*

IN this case, which has a strict connection with the one immediately preceding, George Spankie and James Jollie, on the 6th October 1787, accepted a bill along with John Brough, for L. 500 Sterling.

Of the same date, Mr Brough granted them a holograph missive which, after narrating, that they were only cautioners for him in this bill, concluded thus: “And seeing I agreed to give you an heritable security in relief of the said sum, previous to your consenting to join me in said bill, I oblige myself to do so accordingly, over my property in Register Street, and that as soon as the proper writings can be made out.”

In terms of this missive, Mr Brough, on the 7th December following, granted Messrs Spankie and Jollie an heritable bond of relief, on which infeftment followed the same day.

These gentlemen having agreed that Mr Brough should be held as bankrupt on the 17th January 1788, for the reasons mentioned in the last report, the trustee for his creditors objected to their security, as being obtained within sixty days of this period, and so falling under the act 1696.

The counsel on both sides referred to their papers in the preceding case; and on the part of the defenders it was further urged that the case, 20th February 1772, Houston and Company against Stewart, was precisely in point, it having been there found, that an heritable security, when granted in consequence of an obligation contemporary with the original debt, was to be held in law as granted of the same date with it.

On the other hand, the objectors founded on the following additional authorities; Bankton, b. 1. tit. 10. § 104.; Dictionary vol. i. p. 83. 4th February 1729, Eccles against the Creditors of Mackerston, and 7th February 1769, Peat against Beg. They likewise contended, that a holograph writing cannot prove its date in a question with third parties, and that to pay any regard to it in the present case, would prove the source of endless fraud and collusion.

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certain facts, by the evidence of the above persons, who had formerly been precognosed. This was objected to by the defender, on the following grounds :

1st, That as it was admitted by the pursuer, that the precognition had not been transmitted to the Crown agent, in order to be laid before the Lord Advocate, to enable him to judge whether there were grounds for bringing the defender to trial, was clear, that the sole view in taking it was to give the pursuer an opportunity of preparing and combining the evidence he was to bring forward in the present action. Indeed, in his summons he founds on this precognition, and adds, " that it will be recovered and used as evidence in this process ;" where it has accordingly been lodged for the last eighteen months, during all which time it has been exposed to public inspection. In the circumstances, the witnesses, for the sake of character and consistency, will feel themselves tied up to give their evidence agreeably to what they have already said, and therefore they cannot be admitted ; 10th August 1785, Fall against Sawyers.

2^d, David Maclelland was present when the other two Maclellands emitted their declarations, which is of itself a sufficient objection to his being now received as a witness.

Answered : 1st, The pursuer had no connection whatever with the precognition, further than in giving information to the procurator-fiscal of the injury he had suffered. And it would be strange if a public prosecutor, by taking certain preliminary steps, from which he afterwards thought proper to depart, should have it in his power to preclude the private party from the benefit of those witnesses which he may have occasion to call in an action of damages at his own instance.

It was, no doubt, irregular to found on and produce the precognition in this process ; but it would be extremely hard, on that account, to deprive the pursuer of the evidence of material witnesses, particularly as the Court may order their declaration to be cancelled, and as the witnesses will be purged of partial counsel, before they are examined.

2^d, The presence of David Maclelland was not voluntary, but owing to his official situation of assistant to the town-clerk, and is therefore no objection to his admissibility ; 26th February 1793 Wemyss against Wemyss *.

The Lord Ordinary at first sustained the objections ; but having afterwards taken the cause to report on informations, it was

Observed on the Bench : As the precognition was taken at the instance of the public prosecutor, it is clearly no objection to the admissibility of the witnesses ; and as David Maclelland was only present in the course of his duty, neither ought this circumstance

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* See No. 34.

to be a bar to his evidence. In the Justiciary Court, a similar objection has been repelled, in several late instances.

The Court unanimously repelled the objections.

Lord Ordinary, *Stonefield*.
For Anderson, *Corbet*.

For Sproat, *Solicitor-General, Rae*.
Clerk, *Sir James Colquhoun*.

R. D.

J. LIX.

June 12. 1793.

JOHN HERBERTSON and Company,

AGAINST

JAMES RATTRAY and others.

PROCESS.—*The decree of an inferior court, although fundamentally null, may be turned into a libel.*

CAUTIONER.—*The cautioner in the suspension is not in that case liberated.*

ROBERT RATTRAY was cautioner for James Rattray in a suspension of a decree of a Sheriff, pronounced in absence against him. James objected to the decree, that it was pronounced when he was in England, and when he had neither domicile or property in this country.

The Lord Ordinary turned the decree into a libel; and, in a reclaiming petition, it was

Pleaded, 1mo, for James Rattray: A decree can be turned into a libel, only where it is defective in point of form, and not where (as in the present case) it is fundamentally null.

2do, It was *pleaded* for the cautioner: A pursuer, by executing citation at a place where the defender has no residence, may easily obtain a decree in absence against him. The relief against it only lies by letters of suspension, and these he can only obtain by finding caution to fulfil the decree, in case the letters shall be found orderly proceeded. All that the cautioner interposing in these circumstances can be held to undertake, is, that the decree is incompetent, but not that the claim itself is groundless. The pursuer otherwise would be rewarded for the irregularity

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larity of his procedure, and the defender punished, to whom a fault can be imputed.

Answered: 1mo; The object of turning a decree into a libel, is to save the trouble and expence of bringing a new action, the defective charge being held equivalent to a citation. The defender therefore, never can be a loser by that means. Decrees liable to objections equally strong with the present have been turned into libels; Dict. vol. ii. p. 180. 30th July 1715, Macready against Crawford; Fountainhall, 8th November 1692, Shaw against Kennedy.

2do, The law presumes that every decree is just and formal and as the creditor who has *parata executio* may be altogether disappointed by the delay occasioned by a suspension, before it is obtained, he is entitled to security for payment of his debt, and future expences. The debtor who takes advantage of a point of form, to evade payment of a just debt, is guilty of a wrong; and the cautioner, before undertaking the obligation, ought to examine the nature of the debt. By act of sederunt 29th January 1650, the cautioner in a suspension is declared to be equally liable with the principal debtor; and, by common style, he is taken bound to pay the debt, "if it shall be ultimately found due." That he is not liberated when the decree is turned into a libel was found; Forbes, 30th November 1709, Dunbar against Muirhead; and confirmed by an express act of sederunt, 27th December 1709.

Observed on the Bench: No distinction can be made between one decree and another. The act of sederunt last mentioned is in force, and is decisive against the cautioner.

The Court unanimously adhered.

Ordinary, Lord Monboddo.
Clerk, Home.

For the suspender, Dickson.

Adv. Long.

D. D.

N° LX.

June 18. 1793.

MARY MACEWAN,

AGAINST

JANET THOMSON.

HERITABLE and MOVEABLE.—*A disposition of an heritable estate to trustees, for behoof of creditors, does not always render the moveable debts, even of those who accede, heritable.*

DAVID THOMSON having been incarcerated for debt, was liberated upon granting an obligation to execute a trust-deed, conveying his whole estate, real and personal, in favour of such persons as a meeting of his creditors should appoint. Meetings were accordingly held, and a plan of trust being agreed on, a deed, framed by John Macewan, writer in Edinburgh, was in consequence executed by Thomson. It stated the farther security of his creditors, and more ready payment of their debts as its inductive cause. The trustees were authorised by it to sell the lands, and, in general, to take every necessary step for "effectually securing my said creditors, and obtaining them payment of their debts." In case of their failure by death or non-acceptance, it was declared, that the trust-right and infestment shall stand and subsist as a security to the creditors, who may substitute other trustees in their place. It enumerated the different creditors, and the sums due to them respectively; and it provided, that this specification should not hinder any one creditor to make farther claims, nor the trustees to object to the debts admitted in the trust, or to communicate the benefit of it to creditors who might have been omitted.

The trustees took infestment. Mr Macewan as a creditor acceded to the trust, but died, and without children, before Mr Thomson's property was sold.

In a question between Macewan's heir-at-law and his relict, the former contended, that the debts of acceding creditors were made heritable by the trust, and

Pleaded: When a person voluntarily puts his affairs into the hands of trustees of his own chusing, they are accountable only to

to him, and the right of no third party is affected. But the trust deed now in question was executed at the request of creditors, in order to prevent them from leading separate diligences, and in favour of trustees of their appointment. The infestment, therefore, which followed, put the creditors in the same situation as if they themselves had been infest, or had received heritable bonds of corroboration; Erskine, b. 2. tit. 2. § 15. Kilkerran, *voce* Heritable and Moveable, 6th November 1739, Murray Kinnymond against Cathcart and Rothead; 13th July 1748, Sir William Dunbar against the Creditors of Brodie. It may be true, that Macewan, in acceding to the trust, (and indeed the same might have been said had he accepted any heritable security) had no intention of altering his succession. But where the law has declared that subjects of a certain description descend to the heir, nothing but a settlement can be received as evidence of contrary intention.

Answered: It is not every supervenient right in an heritable estate that will convert a moveable into an heritable debt. By the bankrupt act the debtor is obliged to grant a general disposition to the trustee for behoof of his creditors, and the pursuer of *cessio bonorum*, when possessed of heritable property, must do the same; yet in neither case do the debts become heritable. The material consideration in such questions is, What was the object of the trust; whether to give the creditors an interest in the price of the subject disposed, or to convey to them the lands themselves in security of their debts. The former, it is evident, was intended in the present case. The debts are not made, nor meant to be made a burden upon the estate more than they were before. The creditors did not wish any new or corroborative security, the idea of a trust having been adopted merely as the readiest mode of obtaining payment. Dirleton, 17th February 1676, Waug against Jamieson; 25th February 1780, Grierson against Ramsay; 27th January 1791, Ranking of the Creditors of Redcastle.*

The Lord Ordinary found, that the debt continued moveable—

The Court were of opinion, that the sole object of the trust was to enable the creditors to turn the estate into money, and obtain payment out of the price, and that it neither made, nor was intended to make the debts real burdens on the lands.

It was observed, that if the trust in the case of Kinnynmor reported by Kilkerran, was of the same nature with this deed, the decision of that case was questionable.

The Lords had formerly refused a reclaiming petition without answers; and on advising a second petition and answers, they adhered.

Lord Ordinary, *Henderland.*
Clerk, *Sinclair.*

A&C. *Rolland.*

Alt. *Corbet.*

D. D.

N° LXI.

June 18. 1793.

The CREDITORS of Thomas Dunbar,

AGAINST

Sir JAMES GRANT.

BANKRUPT. Act 1621, c. 18.—*A bond of corroboration falls under its second clause.*

THOMAS DUNBAR of Westfield having become insolvent, a variety of adjudications were led against his estate, of which that obtained by Mr Cuming of Altyre on the 26th November 1788 was the first effectual, and in February 1789 a summons of ranking and sale was executed against him.

On the 2d May 1789, Mr Dunbar granted to Sir James Grant a bond of corroboration, accumulating into one sum, bearing interest from Whitfunday 1788, the principal and interest due at that term on the following claims, viz. A bill payable in 1781, upon which no diligence had followed; a bond, in which Sir James was cautioner for Mr Dunbar; a bond and a bill, in which Sir James, though in reality only cautioner for him, was, *ex facie*, joint obligant. The three last had been paid by a trustee for Sir James, who afterwards assigned the securities to him.

Upon the bond of corroboration Sir James adjudged on the 4th August 1789.

And on his producing this interest in the ranking, the common agent, besides stating a variety of objections to the original grounds of debt, on which no judgment was given, contended, that the bond of corroboration was reducible on the act 1621, as being prejudicial to the prior diligence of other creditors.

Sir James Grant, on the other hand,

Pleaded: The act 1621 was intended solely to repress the fraudulent transactions of bankrupts. It states in its preamble the

mischief arising from their gratuitous deeds in favour of conjunct and confident persons in defraud of lawful creditors. It declares liable to reduction, *imo*, All alienations of that description: 2d Any voluntary payment or right made "by a dyvour, or an interposed partaker of his fraud," to one creditor in defraud of the prior diligence of another, at the instance of the party injured, and it punishes with infamy all parties concerned in such transactions.

The statute must therefore have had in view deeds of a very different complexion from the bond now in question, which can be considered in no other light than as a renewal of the voucher for a just debt, and which, so far from being fraudulent, it was the duty of the debtor to grant. Its sole object was to save the expence of a decree of constitution, which, with an adjudication following thereon, might undoubtedly have been obtained within year and day of the first effectual, as all objections would have been reserved *contra executionem*. The advantage gained by the accumulation of the debts was insignificant; and if at all worthy of notice, could not be the ground of a total reduction.

Besides, the sole effect of the bond was to enable Sir James to rank *pari passu* with other creditors, an object which is so much favourite of the law, that in order to accomplish it, the Court are accustomed to dispense with the usual forms of judicial procedure.

As the statute contains no accurate definition of a bankrupt while its certification is at the same time very severe, it ought to be strictly interpreted. No instance can be found where an objection similar to the present has been sustained. And even upon the 1696, the enactments of which are much more definite and precise, no deed equally harmless has been reduced; 7th January 1762, Cowan against Mansfield's Trustees; Dict. vol. i. Fountainhall, 15th July 1697, Creditors of Hunter; 19th November 1755 Spottiswood against Robertson Barclay; Dict. vol. iii. 31st July 1724, Creditors of Watson against Cramond; February 1722 Creditors of Graitney, Dict. vol. i.

Answered: The act 1621 contains two distinct enactments, which have always received the most liberal interpretation.

By the first, every gratuitous act of the bankrupt which tends to diminish the value of his property, is reducible at the instance of prior creditors; Erskine, b. 4. tit. 1. § 29.

By the second, he is in like manner prevented from making a voluntary payment even to an onerous creditor, in prejudice of the prior diligence of another. Under the former, even family provisions, otherwise unexceptionable, are comprehended; under the latter, not only payments in cash, or by bond, bill, indorsation in security; Bankt. b. 1. tit. 13. § 28. but even necessary acts, such as the fulfilling a minute of sale, provided they have been done without the compulsion of legal diligence; Bankt. b. 1. tit. 10. § 104.

The bond now in question not only enabled the creditor to come in *pari passu* with other creditors, which he could not otherwise

wife have done, but confirmed and accumulated exceptionable grounds of debt. A bond much less hurtful was reduced; 19th January 1788, Scott against Bruce *. Upon the same principle, the Court found, that a person bankrupt in terms of the act 1696, could not grant a bond of corroboration; 1st March 1791, Creditors of Mackellar against Macmath; and it has been frequently found, that such bonds are struck at by a prior inhibition; 29th January 1696, Watson and Logan against Penman; 19th June 1782, Watson against Marshall.

No argument can be drawn from the certification of the statute, as deeds are frequently reduced on both clauses of it, granted by persons ignorant of their own insolvency, and where consequently that certification cannot apply.

Some of the Judges were a good deal moved by the hardship to the creditor, who had time in this case to have led an adjudication independent of the bond, and by its object having been not to give him a preference to other creditors, but to bring him in *pari passu* with them. A great majority of the Court, however, were of opinion, that a bankrupt ought to execute no deed by which the situation of his creditors is affected, and that it would be dangerous to support any deed of that nature.

It was farther observed, that the case of Spottiswood against Robertson Barclay, having been settled by compromise, could be of no weight in point of precedent.

The Lord Ordinary sustained the objection; a reclaiming petition was refused, without answers; and upon advising a second, with answers, the Lords "adhered."

Lord Ordinary Ankerville.

For Sir James Grant, James Grant, Maconochie. For the Creditors, Honyman.
Clerk, Gordon.

D. D.

N° LXII.

* Not collected.

N° LXII.

June 19. 1793.

ALEXANDER PAGAN and JAMES HUNTER,

A G A I N S T

ALEXANDER WYLLIE.

BILL OF EXCHANGE.—BLANK WRIT.—*When a bill already accepted and indorsed is fraudulently altered from a smaller to a larger sum, in consequence of a blank being left in it, and is afterwards discounted all the persons whose names are upon it are liable for the full sum which the discounter bona fide paid for it.*

A Holograph bill drawn by John March, after being accepted by James Hunter, and indorsed by Alexander Pagan, was put into the hands of the drawer, in order to raise money on it, who, there was reason to believe, taking advantage of a blank in the body of the bill, fraudulently altered its amount from eight to eighty-four pounds Sterling, by adding the letter *y* to the end of the word *eight*, and the word *four* immediately after it.

The part thus added had rather a crowded appearance, and seemed to be written with different ink, but in the same hand with the rest of the bill.

After this operation, March discounted the bill for its full value with Alexander Wyllie, agent at Dumfries for the Paisley Union Bank.

Before the bill became due March had fled the country.

Wyllie having charged Hunter and Pagan for payment of the L. 84, they obtained a suspension, and the Lord Ordinary afterwards reported the cause on informations.

The arguments of the bar were in a great measure confined to the special circumstances of the case. In particular, the charge endeavoured to establish, that Hunter and Pagan had been in the practice of entrusting March with bills, blank in the sum, leaving him to fill it up as occasion should require; and from that, and a variety of other specialties, he contended, that they were liable for the full sum for which he had *bona fide* discounted it.

The suspenders endeavoured to obviate the conclusions drawn from these facts, and at the same time to assimilate the fraudulent interpolation to the case of forgery or vitiation; and thence they argued: *1st*, That the alteration being a *vitium reale*, the bill could not be sustained as a document of debt: *2dly*, That as the alteration was visible, Wyllie was equally negligent in not discovering it, as they were in putting their names to a bill with a blank *gremio*; and that therefore both parties being *in pari casu*, where the loss had fallen, there it must remain.

The Court, waving the specialties which occurred in the cause, went upon the following grounds. Where a blank is left in a bill, sufficient to admit the insertion of part of one word, and the whole of another, as in the present case, any person who puts his name upon it, whether as drawer, acceptor or indorser, and trusts it in the hands of another, and particularly of the person by whom it was written, in order to its being passed by him into the circle, must be liable for the consequences, in the same manner as if it had been left blank in the sum altogether, it being nearly the same thing, whether the blank be total or partial. And although, upon a narrow inspection, a small crowding of the letters, and some little difference in the colour of the ink, might have been perceived, both were too trifling to put the discounter on his guard; even if he had hesitated, and made enquiry into these circumstances, he might have been told, without putting him *in mala fide*, that there had been originally a blank left, in order to be filled up with the sum which might be wanted. The circumstance of leaving a blank must be held as a tacit mandate from the parties whose names were upon the bill, entrusting the holder with the power of filling it up; and therefore the present case differs widely from a forgery or vitiation, for there one writing is converted into another, without the consent of the parties, either express or implied.

The Lords unanimously “repelled the reasons of suspension.”

Lord Ordinary, *Dreghorn*.

For the Suspenders, *R. Hamilton*.

For the Chargers, *D. Galtcart*.

Clerk, *Mennies*.

R. D.

N° LXIII.

June 19. 179

MARGARET OLIPHANT and her HUSBAND,

A G A I N S T

JOHN OLIPHANT.

IMPLIED WILL.—CONDITIO SI SINE LIBERIS.—*When an heir of entail who has exercised a reserved faculty to its full extent, by grant of bond of provision to his younger children then existing, marries a second time, and has children by the second marriage, but dies before any alteration on the former bond of provision, are the children of the second marriage entitled to a share of it?*

THE entail of the lands of Bachilton, executed by Patrick Oliphant in 1729, contains the following provision: “That I shall always be liefsome and lawful to me, and the haill heirs of tailzie who shall succeed in time coming, to provide for my younger, or their younger children, other than the heir, shall succeed to the lands and estate before mentioned, with such able and competent provisions, not exceeding three years rent of the estate for the time.”

Under this entail, John, commonly called Lord Oliphant, succeeded to the estate. In 1776, when he had three children, Mary, Margaret and Eleonora, he granted to the two latter a bond of provision for L. 1000, or such other sum, less or more as should amount to, and not exceed three years rent.

After the date of this bond, John Oliphant married a second wife, by whom he had two children, John, who was above 16 years of age when his father died in the year 1781, and Jane whom he left his wife pregnant.

At his death he had no other fund for the provision of his younger children, except the reserved power to burden contained in the entail. Henry, the eldest son by the first marriage, predeceased his father, leaving one son, John Harrison Oliphant, on whom the estate devolved.

In 1785, Margaret Oliphant took a decree of constitution against him, for one half of the sum contained in her father's bond of provision to her sister and her, and having thereafter led an adjudication against the estate, she brought an action of mails and duties.

John Harrison Oliphant, the defender in this action, at the time brought a reduction of the bond, and whole diligence proceeding upon it; but having died during the dependence of the actions, the succession opened to his uncle John Oliphant, thereby became a party to them, and

Pleaded: The reserved faculty was intended as a fund of provision to the whole younger children of the heir of entail. John Lord Oliphant, therefore, by excluding his children of the second marriage, exceeded his powers, and they are entitled, if not to set aside the bond *in toto*, at least to an equal share of its benefit with his other younger children. Upon the same principle, although a father has the power of distributing the sums provided by a marriage-contract to the younger children, if he should attempt to exclude any one child altogether, that child would be entitled to the same share as if no division had been made.

The case in question is much stronger than if the children of the second marriage had been intentionally excluded. At the date of the bond, the defender and his sister were not in existence, or in the view of the granter. In these circumstances, the law will presume, that it was granted under the implied condition, that if other children should afterwards be born, they should come in for an equal share; 8th July 1729, Anderson against Anderson; *Inst. lib. 2. tit. 13. § 1.*; *Vinnius ad loc cit.*; *ff. l. 3. § 1. de injust. rupt. Sc. test. l. 12. pr. ejus tit.*; *ff. lib. 28. tit. 2. de liber et post. Sc.*; *Voet § 4. ejus tit.*; Blackst. vol. ii. p. 502.; Raymond's Reports, p. 441. Lugg v. Lugg; Peere William's Reports, vol. i. p. 304. Cook v. Oakly.

Answered: The entail gave the heir a *power* of providing for the younger children, but laid him under no *obligation* to grant a provision to any one of them, far less to the whole. The spirit of an entail, which is to preserve the estate as free from incumbrances as possible, is adverse to the presumption of such an obligation. As therefore the father might have omitted to take advantage of the faculty altogether, so he is the sole judge of the proper mode of exercising it; the children here had no *jus crediti*, as they would have had, if they had claimed under a marriage-contract.

How far it was an implied condition in the bond, that the children born after its date should have an equal share of it, is a mere question of intention, and such presumption is excluded by the circumstances of the present case, where the granter, the heir under a strict entail, survived the execution of the bond fifteen, and the birth of the defender, two years; Bankt. vol. i. p. 227. § 6. 20th December 1758, Yule against Yule.

The plea of the defender is the more unfavourable, that he has since his father's death succeeded to the entailed estate; and it cannot be presumed, that his father, had he foreseen that event, would have diminished the provisions to his daughters on his account, or at least it is probable that he would have qualified the provision so as that it should cease upon the defender's succeeding to the estate. Little argument can be drawn from the *tit. de rupt. Sc. test.* because by the Roman law *sui heredes* could only be disinherited *nominatim*; so far, however, as its principles admit of a question of implied intention, it is agreeable to the doctrine now laid down; *l. 102. ff. de condit. et demonst. lib. 35. tit. 1.*; *Voet, lib. 36. tit. 1. § 18. ad S. C. Trebell.*

Replied:

Replied: If the heir of entail had made no provision upon the younger children, the Court, upon the same principles of equity upon which they have proceeded in similar cases, would have found them entitled to the full extent of the faculty; 10th February 1673, Graham against Lord Morphey, Dict. vol. i. p. 291.

The Lord Ordinary “repelled the defences, and decerned against the tenants and factor in the mails and duties libelled.”

At advising a reclaiming petition and answers, it was

Observed on the Bench: If the defender ever had a right to claim any part of the bond of provision, he could not lose it by succeeding to the estate. But as he was born two years before the death of his father, who, during that time, neither revoked the bond, nor made any alteration upon it, the presumption of law is, that he did not intend that this son should have any share of the provision. The defender's sister is in a different situation. She, as a posthumous child, may be entitled to a proportional part of the bond. But as she is not a party in the present suit, all that can be done is to reserve her interest.

The Court accordingly “repelled the defences, so far as the petitioner (defender) claimed any share of the provision in question, as one of the younger children, and found the pursuer and her husband entitled to one half of said provision; reserving nevertheless to Janet Oliphant the petitioner's sister to claim her share of the said provision.”

Lord Ordinary, *Hailes*. Act. *Rolland et alii*. Alt. *Macleod-Bannatyne*.
Clerk, *Sinclair*.

R. D.

June 1793.

COURT OF SESSION.

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N^o LXIV.

June 19. 1793.

DAVID HEPBURN,

AGAINST

WILLIAM SKIRVING.

HEIRSHIP MOVEABLES.—*The heir has right only to a single horse, and having got an ox and a cow, he is not entitled to a bull.*

WILLIAM SKIRVING, as heir of James Skirving his brother, intromitted with part of his moveable effects. David Hepburn, in right of his wife, who was sister of James, and one of his nearest in kin, brought an action against William, to make him account for her share of the executry of her deceased brother.

In accounting the defender insisted, that he was entitled to retain, as heirship moveables, a plough of horses, and an ox, a cow and a bull.

The pursuer denied his right to a bull, and quoted the following authorities, in order to show that he was only entitled to one horse; Balfour's Practics, p. 234.; 1474, c. 53.; 10th November 1575, Lord Drummond, stated in Dict. vol. i. p. 364.; Erskine, b. 3. tit. 8. § 17.

The defender, on the other hand, argued, *imo*, That the heir was entitled to a yoke of oxen; Stair, b. 3. tit. 5. § 9.; Bankt. b. 3. tit. 4. § 6.; and that Erskine, b. 3. tit. 8. § 18. considers a yoke to be "as many as make a plough," and that therefore, from analogy, he was also entitled to a plough of horses; Stewart's Answers to Dirleton, p. 214.

2do, That he was entitled to the "best of ilka thing," and consequently to a bull, as being essentially different from an ox.

The Lord Ordinary repelled the defender's claim to a bull, and found in respect of Balfour's Practics, p. 234. that in virtue of his right to heirship moveables, he can claim only one horse.

A reclaiming petition against this interlocutor, was refused, as to the defender's right to a bull, and ordered to be answered respecting the claim to a plough of horses. At advising the cause, it was

Observed on the Bench: Although the heir is entitled to two oxen, it does not follow, that he can also claim two horses. When heirship moveables were first introduced, oxen were used only for draught, and a single ox therefore would have been of

N n

little

little service. But a single horse must have been always useful for many purposes.

The Court, with only one dissenting voice, adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Dregborn.*

A. Hay.

Alt. Bell.

Clerk, *Sir James Colquhoun.*

R. D.

N° LXV.

June 25. 1793.

ARCHIBALD and JAMES ROBERTSON and Company,

A G A I N S T

J O H N L A I R D.

POLICY OF INSURANCE.—*The clause in a policy "with leave to call at a port," does not justify an alteration of the voyage.*

THE facts which gave rise to this question are already stated in Fac. Coll. No. 147. 16th November 1790. From that report, it appears, that the Court refused the bill of suspension presented by Mr Laird.

Against this judgment, Mr Laird appealed to the House of Peers, where the interlocutor was reversed, and the cause remitted back, with an order to pass the bill.

This having been accordingly done, the grounds of suspension came to be discussed before the Lord Ordinary, who "found, that a voyage insured from Virginia to Rotterdam, with liberty to call at a port in England, does only entitle the insured to call at such ports on the English coast as lie in the track of the voyage, but not at a port which is so much out of the natural course of the voyage as Hull is; and therefore suspended the letters *simpliciter*."

The pursuer preferred a reclaiming petition, which was refused. A second having been presented, answers were ordered, which were followed with replies and duplies.

At advising the cause, the Judges considered the voyage to be entirely altered, and therefore held the policy to be vacated.
Upon

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Upon that ground, they unanimously "adhered to the Lord Ordinary's interlocutor," suspending the letters.

Lord Ordinary. *Justice-Clerk.*
Alt. *Rolland, John Millar.*

Adv. *Sir W. Millar, John Clerk.*
Clerk, *Mennies.*

R. D.

N° LXVI.

June 26. 1793.

ALEXANDER BRUCE,

AGAINST

The REPRESENTATIVES of John Stein.

PRESCRIPTION. 1695, c. 5.—*The cautioner in a bond of relief is not entitled to its benefit.*

ON the 3d May 1770, the late Lord Kennet and Robert Stein, granted to Sir Alexander Ramsay Irving, Baronet, their joint bond for L. 1200.

On the 23d June following, Robert Stein, James his brother, and John his father, became conjunctly and severally liable to relieve Lord Kennet of this obligation, by delivering up to him his bond, or a valid discharge of it at Martinmas 1770, or thereafter when he should desire it. This second bond bore, that the former one had been granted solely on account of Robert Stein, and that Lord Kennet had joined in it only on promise of this bond of relief being granted.

John Stein died in 1771. Upon the bankruptcy of Robert and James Stein, in 1788, Sir Alexander Ramsay's bond was paid by Mr Bruce of Kennet, who brought an action against them, and the other representatives of John Stein. The latter, *inter alia*,

Pleaded: As it appears from the bond to Lord Kennet, that John Stein was only cautioner for his son Robert, his obligation falls under the septennial prescription, in the same manner as if it had contained a clause of relief, or as if there had been a separate bond of relief intimated to the creditor; Dict. 11th December 1729, Ross against Craigie; 20th November 1792, Douglas, Heron and Company against Riddick.

Answered: There is no room for distinguishing a bond of relief from any other corroborative security to which it is *triti juris*,

juris, that the septennial prescription does not apply; *Diſc.* vol. iii. p. 302.

Replied: The preſent is very different from a bond of corroboration, which gives an additional ſecurity to the creditor, and is granted *ex intervallo*. Here no further ſecurity was given to the creditor; and as the bond of relief was ſtipulated from the beginning, it muſt be conſidered as *pari ejusdem negotii* with the granting of the original bond.

The cauſe was adviſed on informations.

The Lords unanimouſly “repelled the defence.”

Lord Reporter, *Craig*.
Clerk, *Mitchelſon*.

Aſſ. *Allan Macdonald*.

Alt. *Rolland*.

D. D.

N° LXVII.

June 26. 1793.

JAMES TURNBULL and MALCOLM MACDONALD,

A G A I N S T

Sir GEORGE HOME, Baronet.

APPRENTICE.—*A perſon bred to the ſea, who afterwards binds himſelf apprentice to a trade may either be impreſſed or enter voluntarily into the ſervice of the Royal Navy.*

ALLEXANDER MACKENZIE, originally a ſeaman, in December 1789, bound himſelf as apprentice for four years and a half to James and Alexander Rannie, ſlaters and glaziers in Edinburgh.

In 1791, he, on account of ſome diſagreement with them, left their ſervice, upon which they obtained a warrant from the Juſtices of the Peace, to impriſon him, till he ſhould find caution to fulfil his indenture.

In a suspension, which is still in dependence, James Turnbull and Malcolm Macdonald were his cautioners.

In spring 1793, Mackenzie entered into the Navy, as a volunteer, with Sir George Home, then regulating Captain at Edinburgh; against whom Turnbull and Macdonald brought a suspension and interdict.

For Sir George Home it was

Pleaded: An engagement to serve in the Navy supercedes all former engagements, whatever claim there may thence arise against the party himself for damages. There is no authority for distinguishing the case of an apprentice from that of a person under any other engagement. If there had, the enactments of 2 and 3 of Anne, c. 6. § 4. 15. and 17. and 4 Anne, c. 19. § 17. exempting persons bound apprentices to the sea from being impressed, in certain cases, would have been unnecessary; and there is no reason why an apprentice to a trade at land should be in a better situation.

Answered: The contract of indenture is from its utility peculiarly deserving of protection: It gives the master a real right in the person of his apprentice. Hence it has always been understood, that an apprentice cannot be impressed, and still less enter voluntarily into the service of the public.

The acts of Queen Anne have no connection with the present subject. It may be true, that where a sailor has regularly entered, his former engagements are at an end; but the question here is, whether Mackenzie was capable of entering?

The Lord Ordinary reported the cause on informations.

Observed on the Bench: A person bred to the sea, who afterwards binds himself apprentice to a trade, may be impressed, and consequently may enter voluntarily into the Navy. If every seaman could, by entering into an indenture at land, save himself from being impressed, there would be an end to the impress service. This point was deliberately determined, on the 28th July 1778, Chalmers against Napier, when it was fixed, that the only exception is in the case of a person bound apprentice to the sea for three years, who has not formerly followed that employment; an exemption introduced by 13 Geo. II. c. 17.

The Court unanimously repelled the reasons of suspension, and recalled the interdict.

Lord Reporter, Swinton.
Clerk, Sinclair.

For the Suspenders, D. Williamson.

Alt. Maconochie.

D. D.

N^o LXVIII.

June. 29. 1793.

Messrs E D I E and L A I R D, and the other Creditors of
John Weir,

A G A I N S T

RACHAEL and ANNE ROBERTSONS.

DEBTOR AND CREDITOR.—*A preferable catholic creditor may, before the bankruptcy of his debtor renounce part of his security, without diminishing his right over the remaining subjects contained in it, although such renunciation should hurt the security of a secondary creditor obtained before its date.*

IN 1773, John Weir granted an heritable bond for L. 470 Sterling, over the lands of Kerse, Daldaholm, and Clanochyett, in favour of Margaret, since dead, and of Rachael and Ann Robertsons.

In 1777, Mr Weir granted an heritable bond for L. 2000, over the lands of Kerse alone, to Messrs Edie and Laird.

In 1782, the Miss Robertsons renounced their heritable security over Clanochyett, with the sole view of accommodating Mr Weir who intended to exchange these lands for others belonging to a neighbouring proprietor.

Mr Weir having afterwards become bankrupt, his estate was brought to judicial sale, when the lands of Kerse were sold for L. 1900, those of Daldaholm for L. 910, and the projected exchange of the lands of Clanochyett never having been carried into execution, they were sold for L. 810.

Miss Robertsons having applied to the Court for a warrant on the purchasers for L. 600, to account of the principal and interest due on their bond, their petition was remitted to the Lord Ordinary in the ranking, before whom Messrs Edie and Laird, and the other creditors of Mr Weir

Objected: That as Messrs Edie and Laird were creditor by heritable bond over Kerse alone for L. 2000, and bygone interest, a sum which exceeded the price it had brought, and as the renunciation executed by the Miss Robertsons was posterior to the date of the bond to Messrs Edie and Laird, the Miss Robertsons were not entitled to draw out of the price of the lands of Kerse and Daldaholm that proportion of the sum due to them, which they would have received out of the price of Clanochyett, had they not renounced their investment over the lands, because their doing so would have the obvious effect of ~~diminishing~~

minishing improperly the only fund from which Messrs Edie and Laird must obtain payment of their bond. The common debtor was bound in justice to pay the Miss Robertsons out of the other lands, so as to leave Kerse free, for the satisfaction of the posterior debts with which he had burdened it; and if so, the Miss Robertsons were not entitled to concur in any deed which put it in his power to elide this duty. If a creditor whose debt is secured by a cautioner, do diligence against the principal debtor, or obtain an heritable security from him, and afterward pass from the one, or discharge the other, the cautioner is *ipso jure* free from his obligation; 21st January 1729, Macmillan against Hamilton; 16th July 1730, Graham against Lyle; Ersk. b. 3. tit. 3. § 66. and tit. 5. § 11. Upon the same principle, the renunciation in the present case cannot affect the interest of the objecting creditors; Kames's Pr. Eq. b. 1. § 1.

Answered: When an heritable bond is granted over several subjects, each is liable, not for a proportional part only, but for the whole of the debt, and the creditor may lay the burden entirely upon any one of them. The renunciation, therefore, as to Clanochyett, cannot weaken that security which the Miss Robertsons had *ab ante* over Kerse and Daldaholm.

When a person lends money upon land, he is presumed to have searched the records, to learn with what preferable burdens the subject is affected. But when a creditor, having a prior catholic security, renounces it in part, there is no tie upon him, even in equity, to consult registers, in order to discover the effect this measure will have upon the interests of secondary creditors. The present, therefore, is very different from the case of a creditor who renounces a separate security, to the prejudice of his cautioner. The latter, on payment of the debt, would have been entitled to an assignation of that security, and the creditor cannot be ignorant of the existence of his obligation and claim of relief.

The Lord Ordinary having reported the question, on minutes of debate, it was

Observed on the Bench: When the Miss Robertsons granted the renunciation in question, they could not know that there was a posterior creditor who would be hurt by it. A person lending his money on land already affected by incumbrances, ought to be satisfied that it is sufficient both to purge them, and to pay his own debt, and not trust that the prior creditors will draw their payment from other collateral securities which may be renounced. There is no similarity between the present case and that of a creditor who has the security of a cautioner. There the creditor lies under an implied obligation to distress the cautioner as little as possible; but between the Miss Robertsons and Edie and Laird there was no connection whatever. It is no doubt a general principle, that a catholic creditor is obliged either to draw proportionally out of all the subjects over which his right extends at the

the time when he obtains payment, or to assign; but in no case is he obliged even to do this, so as to hurt his own interest.

The Court unanimously repelled the objection.

Lord Ordinary, *Craig*.
Clerk, *Home*.

Aft. *Wolf Murray*.

Alt. *Wm. Robertson*.

R. D.

N° LXIX.

July 8. 1793.

The TRUSTEES for the Creditors of William Bogle,

AGAINST

JOHN BALLANTYNE.

COMPENSATION AND RETENTION.—*Two surviving and solvent partners of a dissolved company being sued for payment of a company-debt at the instance of trustees for the creditors of a bankrupt to whom it was due, it is competent for one of the defenders to plead compensation to the full amount upon a private debt due to him by the bankrupt.*

IN the year 1777, William Bogle, Thomas Blane, John Ballantyne, William Wilson and William Ballantyne, engaged in a joint adventure, under the firm of Ballantyne, Wilson and Company, for the purpose of exporting goods to New York.

By their agreement, it was provided, that if any of the partners died, or became insolvent, before the sale of the goods, their heirs or creditors should draw out, without either profit or loss, the sums which such partner had advanced.

The affairs of William Bogle having gone into disorder, he, in the year 1778, disposed his estate to trustees for his creditors.

Mr Bogle had advanced L. 300 in the concern of Ballantyne, Wilson and Company, which, as the sale of their goods was not finished when he became insolvent, his creditors, in terms of the contract, had a right to draw out. The other partners accordingly granted a missive, binding themselves to pay the L. 300 by certain instalments to Mr Bogle's trustees, who, on the other hand, obliged themselves to assign over Mr Bogle's share in the concern to the other partners.

When this transaction took place, John Ballantyne was a private creditor to Mr Bogle in a bill for L. 333, 15 s.

While the partnership subsisted, Wilson another of the partners became bankrupt, and William Ballantyne died.

is made against each of the two defenders individually, as liab *in solidum* for the debt.

Answered: Although each partner in a Company has both a private and a social character, which are distinct, and which produce the difference between his private and his copartnery debts; yet still a Company and its partners are one and the same, and of consequence each partner is bound, not as cautioner, but as co-principal for the debts of the Company. Indeed, the idea of their being cautioners only, is unintelligible, as in that case there would be no principal debtor. It is also a quality of the Company debt arising both from the nature of copartnership and from expediency, that they cannot be compensated with, but, on the contrary must in all cases be kept entirely distinct from the debts and obligations of the individual partners; *Voet, de Compensationibus*, § 1 16th June 1774, Galdie against Gray; 29th November 1774, Mackie against Macdowall and others; 18th June 1783, Cavine against Robertson.

Besides, the defender acknowledges, that when the action proceeds solely against a Company, compensation cannot be pleaded upon a debt due to an individual partner. But it is not easy to conceive, in what other manner a decree could be obtained against a Company, than by calling all the existing partners and concluding against them conjunctly and severally in that character, which is precisely the mode the pursuers have followed. A summons brought in this form is in the strictest sense a summons brought against the Company, and consequently no compensation upon a private debt can be pleaded in bar of a decree following upon it against the Company. In all events, therefore, a decree should proceed in the present action. If diligence shall afterwards be used upon it personally against Mr Ballantyne, it will then be time enough to try the question, whether a partner can set off his own private debt against that of the Company. At present, the pursuers only ask a decree against the Company, and against the partners conjunctly and severally, as representing the Company, which, when obtained, will enable them to make the payment effectual from either or both of the defenders, or perhaps to attach the effects of the Company, if they can find them.

The Lord Ordinary repelled the defence, and decerned against Messrs Ballantyne and Blane, in terms of the libel. A petition for Ballantyne, reclaiming against this interlocutor, was refused. But on advising a second, the Court "sustained Mr Ballantyne's defence." On advising a reclaiming petition for the pursuers, the Lords "altered their interlocutor, and repelled Mr Ballantyne's plea of compensation." Mr Ballantyne having again reclaimed, the Court once more sustained his defence. Upon which Bogle's trustees having reclaimed, the Court, considering the point of law to be attended with difficulty, and that there was a diversity of opinion on the Bench with regard to it, ordered a hearing in presence. When the cause came to be advised, the Court continued to be divided in their sentiments.

Some of the Judges were of opinion, that as there were no visible funds of the Company extant, and as no business had been done for many years under the Company firm, the partnership was to be considered as at an end; and that the debt owing to Bogle's trustees was now in reality due by Ballantyne and Blane as *correi debendi*. In this situation, however, it was observed, no more than one half of the sum was the proper debt of Ballantyne, and therefore he was only entitled to compensate to that extent. Blane himself was solvent and in the field. The pursuers were therefore entitled to a decree against him for the other half, as he surely had no right to plead compensation on a private debt due to the other defender. If indeed Bogle's private debt had been due to both defenders, compensation might have been pleaded upon it to its full amount. But as the doctrine of compensation had been introduced solely from considerations of expediency, and was not founded in strict law, it ought never to be stretched beyond the limits of material justice, which required, that each of two *correi debendi* should himself specifically fulfil his own part of the obligation. Blane was therefore bound to pay down his half of the L. 300. It was true indeed, that Ballantyne, before Bogle's bankruptcy, might, by a transaction with the other defender, have taken his share of the debt entirely upon himself *delegatione*, and then he might have pleaded compensation to the whole extent; but no such transaction could now take place, as by Bogle's insolvency his creditors had a *jus quasitum* in the debt as it then stood. The general rule of law certainly was, that a Company debt would not be set off against a private debt, nor *vice versa*; and in the present case, the defenders were called *socio nomine*, not to pay a private, but a Company debt; but supposing this rule could be got over, on account of the dissolved state of the Company, (which one Judge maintained it could not), it still remained a clear proposition, that Mr Ballantyne was only to pay out of his private pocket one half of the sum demanded; and therefore he had no legal interest or title to insist, that his private debt should be set off against it to a greater amount. His desiring more was for the purpose of obtaining, by the acquiescence of his partner, a partial preference for his whole private debt, over the other creditors of Bogle the bankrupt.

A majority of the Judges, on the other hand, thought that compensation was pleadable by Mr Ballantyne in its fullest latitude: That in determining the question, there was no occasion to enquire whether the Company was solvent or insolvent, dissolved or not dissolved, for in all these situations the same rule would hold: That when a creditor pursues a Company for payment, he cannot prevent any one partner from standing forward, and discharging the debt, although out of his own private funds. That, on the other hand, a creditor has it in his power to demand payment *in solidum* from any individual partner, without discussing the Company. And as every partner therefore may not only make an ultroneous offer, but may even be compelled to pay, so he also must be entitled to plead compensation, it being a general rule, that the obligation to pay always implies a right to compensate. It is true indeed,

indeed, that the Company may in certain situations object to an individual partner being allowed to discharge their debt; but if they do not, such objection is *jus tertii* to the creditor. Thus, in the present case, had Blane been a private creditor of Bogle, he might have himself insisted on compensating his own half of the debt; but if he did not, the pursuers, even in that case, could not have opposed the extinction of the whole claim, by the compensation pleaded by Ballantyne.

The Court adhered to their last interlocutor, sustaining the defence of compensation.

Lord Ordinary, *Justice-Clerk.*

A&C. *Maconochie, M. Rofs.*

Alt. *Rolland, G. Fergusson, Catbcart.*

Clerk, *Sinclair.*

R. D.

N° LXX.

July 9. 1793.

WILLIAM DANIEL ARTHUR FRANK, and his Tutor *ad litem*,

A G A I N S T

J A M E S F R A N K, and others.

WRIT.—1681, c. 5.—*Instrumentary witnesses may be examined as to the facts of their having seen the granter subscribe, or heard him acknowledge his subscription.*

CHARLES FRANK disposed his estate of Bughtrig to James Frank and others, passing by William Daniel Arthur Frank, his heir-at-law.

In a reduction of his settlement, at the instance of the latter, the reasons insisted on were, *1mo*, That the instrumentary witnesses did not see the granter adhibit, nor hear him acknowledge his subscription: *2do*. His mental incapacity.

After several witnesses had been examined upon the whole cause, the pursuer proposed to bring forward the instrumentary witnesses in support of the first ground of reduction. This being objected to, the Lord Ordinary took the cause to report on minutes, and a hearing in presence was ordered, when the defender

Pleaded: The essence of every writing is the will of the party, and to secure its authenticity, various regulations have been adopted. For this purpose, originally the seal of the granter, afterwards his subscription in the presence of witnesses, was required,

tended to remedy this evil ; Ersk. b. 3. tit. 2. § 13. But it is not said, that their subscription shall exclude all further proof ; on the contrary, they are declared to be the only witnesses whose evidence may be taken.

The object of the statute was not only to secure the authenticity of the granter's subscription, but to afford evidence of his will ; and it is not disputed, that instrumentary witnesses may be examined as to every circumstance which does not strike against the truth of their own attestation. But if it be competent to ask an instrumentary witness, whether the deed was extorted from the granter, and he should answer he did not know, it must also be competent to enquire into the cause of his ignorance ; if he should say that he was absent, he would thus contradict his own attestation.

Besides, if their evidence is excluded, every deed, however fraudulently obtained, if *ex facie* regular, must be supported ; for in such cases care will be taken that no person shall be present, except the parties and the instrumentary witnesses.

Socii criminis are admitted as evidence even in criminal trials, reserving all objections to their credibility. No more is asked in the present case. A deed otherwise unexceptionable would not perhaps be set aside solely by the evidence of the instrumentary witnesses ; but where fraud is alleged, their evidence may safely be taken in support of the other circumstances of the case.

In the case, November 1682, Stevenson against Stevenson, at a period when the act 1681 must have been well understood, a bond was set aside, because one of the instrumentary witnesses deposed he had not seen the granter subscribe. They have often been examined since ; Dict. vol. ii. v. Writ ; and if the same objection has not been repelled, it shows that the point must have been considered as so clear that it was unnecessary to state it.

Observed on the Bench : It has been the uniform practice to examine instrumentary witnesses, and the objection only goes to their credibility. But as their evidence may involve them in the punishment of accession to forgery, they may, if they think proper, decline answering any question which tends to criminate themselves. If at a distance of time they should depone that they did not recollect, or even if they should deny the fact they have attested, their evidence, *per se*, probably would not be held sufficient to set aside the deed. The case quoted from Burrow is not inconsistent with this opinion. Respectable persons only should be employed as witnesses.

The Lords unanimously “ repelled the objection to the examination of the instrumentary witnesses, reserving all objections to the credibility of their depositions.”

Lord Reporter, *Eskgrove*.

Adv. Dean of Faculty, *W. Erskine*.

Adv. Solicitor-General, *W. Murray*.

Clerk, *Menzies*.

D: D.

DECISIONS

OF THE

COURT OF SESSION,

From November 1793 to July 1794.

COLLECTED BY

ROBERT DAVIDSON and DAVID DOUGLAS, Esqrs,
ADVOCATES.

By Appointment of the FACULTY of ADVOCATES.

EDINBURGH:

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DECISIONS

OF THE

COURT OF SESSION.

N° LXXII.

November 19. 1793.

DOUGLAS, HERON and COMPANY,

A G A I N S T

The TRUSTEES of Andrew Grant.

FORUM COMPETENS.—*An English administrator having a domicile in Scotland, may be sued in the courts of this country.*

PRESCRIPTION.—*The sexennial prescription of bills runs from the last day of grace, and not from the day of payment.*

MR Baron Grant, on the 16th May 1772, accepted two bills drawn on him by John Fordyce, payable sixty-five days after date.

The bills were indorsed to Douglas, Heron and Company, by whom they were protested on the 23d July 1772, being the last day of grace.

A sequestration having by that time been awarded against Mr Fordyce, these bills were, in August 1772, produced for Douglas, Heron and Company, at a meeting of his creditors, as their grounds of debt.

In 1775, they, in common with Mr Fordyce's other creditors, accepted of a composition, and granted him a discharge.

On 23d July 1778, a summons was executed against Andrew Grant, as representing his brother the Baron, for payment of the balance still due upon the bills. Andrew Grant died while this

R r

action

action was in dependence, after having conveyed his estate in the West Indies to trustees, by a deed in the English form, upon which they afterwards obtained letters of administration in the Prerogative Court of Canterbury.

In an action brought against the trustees, who, though they resided chiefly in England, had a domicile in Scotland, they, *inter alia*,

Pleaded: 1mo, The trust-estate is subject to the law of England; the deed is executed in the English form; the trustees have found caution for their intromissions, in the Prerogative Court, where they are liable to account, and therefore they cannot be sued in this country; 11th July 1754, Burroughs against Grant.

2do, The bills are prescribed. The sexennial prescription runs from the time when bills become exigible, *i. e.* from the day of payment; 12 Geo. III. c. 72. § 37. The days of grace were introduced, not for the sake of the debtor in the bill, but in order to regulate questions of recourse; Ersk. b. 3. tit. 2. § 33. Diligence may be raised before the days of grace are elapsed, 2d July 1788, Charles against Skirving; and interest, as well as the six months allowed for registration, run from the day of payment.

Answered: 1mo, The trustees are personally liable for the debts of the truster, to the extent of the funds in their hands. The taking out letters of administration, and finding security, are intended only as an additional safeguard to creditors and others interested in the succession, and the trustees notwithstanding may be prosecuted in any court having jurisdiction over them; 25th February 1790, Morison against Kerr.

2do, The days of grace, or of respite, as they have been sometimes called, have been introduced in favour of the debtor in the bill; Forbes on Bills, p. 140. § 7.; Kames, 6th July 1743, Ramsay against Hog. The last day of grace is uniformly considered by merchants as the period when payment becomes exigible. Thus in an account of bills, payable and receivable, it is always stated as the time when payment is to be made, or received. When payment is made on that day, interest is never demanded and from it the rates of discounting, or of exchange, are always reckoned. No legal authority warrants diligence against the acceptor before the days of grace are elapsed in this country; on the contrary is established in England; 4th vol. Termly Report Hilary term 1791, Brown v. Harraden.

The Lord Ordinary sustained the plea of prescription.

At advising a reclaiming petition, with answers, the Court seemed to be of opinion, that to interrupt the sexennial prescription, the action ought to have been commenced within six years from the day of payment.

on account of certain trespasses against the acts relating to salmon-fishing, alleged to have been committed by them on the coast adjoining to the places of their residence. The defenders declined the jurisdiction of the Magistrates of Stirling, who overruled their plea. Of this judgment they complained by bill of advocacy, which having been passed, besides disputing how far the jurisdiction of the Magistrates of Stirling ever extended to the places of their residence, they

Pleaded: The act 1581, which appears to have been very disagreeable to the great families possessed of heritable jurisdictions, (1594, c. 224.; 1597, c. 265.), has been long in desuetude. Few instances have been pointed out, where processes have been carried on before the Magistrates of Stirling for such trespasses. The earliest of them is in 1748, and they are of no weight in point of precedent, because the mode of trial by jury, as directed by the act, was not then followed. Indeed, the statute in question, as being a commission of Justiciary, was virtually abrogated by the act 1592, c. 128. annulling all such commissions; and also by the acts 1600, c. 11. and 1606, c. 5. by which offences against the salmon-fishing are declared punishable as theft, and consequently fell to be tried before the ordinary judges: And, at all events, the act was taken away by 20 Geo. II. c. 43. abolishing heritable jurisdictions.

Answered: The act in question has been confirmed by subsequent statutes, 1696, c. 33.; 1705, c. 2.: the jurisdiction conveyed by it has often been exercised by the Magistrates of Stirling, and was not abolished by 20 Geo. II. as it reserves entire the privileges of royal boroughs.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: All extraordinary jurisdictions, such as those created by the act in question, are now at an end. The enactments of the statute are altogether unnecessary in the present state of the country. Indeed, as the powers conveyed by it are in general bestowed upon individuals, without mentioning their heirs, it must have been intended merely as a temporary regulation. It is in this respect similar to the branch of the act 1685, c. 20. appointing masters of the game.

The Lords unanimously affoizied the defenders.

Lord Reporter, *Dregborn.*
Clerk, *Gordon.*

A& *Moir.*

Alt. *Dean of Faculty.*

D. D.

Universal Kirk of Scotland, p. 34. The act 1567, c. 11. was accordingly passed at their desire, and in terms of their request. Now, the superintendents at that time constituted an acknowledged branch of the ecclesiastical government of the country. It was in this character that the charge in question was entrusted to them, and in the exercise of it they were no doubt liable to the controul of the superior church judicatories.

At the General Assembly, which met in April 1581, the office of superintendents was abolished, and presbyteries were introduced, to whom it was proposed by the Synod of Lothian to the Assembly, that the trial and admission of schoolmasters should in future be committed, which clearly shews their idea of the nature of this jurisdiction; Calderwood, p. 120.

By statute 1581, c. 99. which was passed in October of the year, intended to ratify the privileges of the church, (and which has since been often confirmed; 1592, c. 116.; 1690, c. 5.; 1707, c. 6.) the act 1567 is expressly ratified; and as the office of superintendent was now at an end, the powers formerly enjoyed by them must have been understood to have devolved on the presbyteries and the other church-courts which supplied their place.

Upon the restoration of Episcopacy, it was ordained by an act of the Privy Council in 1616, and afterwards by statute 1637, c. 5. that parish schoolmasters should be maintained by the parishioners, and named by the heritors at the sight of the bishop.

When the Presbyterian church-government was re-established various acts were passed by the General Assembly, declaratory of its right to this jurisdiction, 1638, 1642. And when Episcopacy was once more restored, the act 1662, c. 4. directed that schoolmasters should be licensed by the ordinary of the diocese.

At the Revolution, the Presbyterian religion was finally restored, and with it the jurisdiction of presbyteries over schools is a matter of course.

At last, the act 1693, c. 22. was passed, confirming the acts 1567, 1581, and 1592, and declaring, "That all schoolmasters and teachers of youth in schools are, and shall be liable to the trial, judgment, and censure of the presbytery of the bounds for their sufficiency, qualification and deportment in the said office." And that this act was considered not as conferring new jurisdiction on the presbytery, but as ratifying the inherent right of the church, is evident, both from its using declaratory words, and from its being entitled "An act for settling the quiet of the church." It is true, indeed, that presbyteries alone are mentioned; but nothing short of an express enactment of the Legislature can exclude the usual right of a superior court to review the judgment of an inferior one; Erskine, b. 1. tit. 3. § 20.; 10th March 1754, Buchanan against Towart. And in this case no such exclusion of the superior church-courts was intended. In the clause immediately subsequent to that relating to schools, the act speaks "of the church and judicatories thereof." The nature of the Presbyterian form of government was perfectly familiar to the Legislature when this statute was passed, and it ratifies the

act 1690, c. 5. establishing that form of which the subordination of the different courts is the basis. Accordingly, it has always been understood, that the superior church-courts have the jurisdiction now claimed; Act of Assembly 1699; 1725, Shiels, Synod of Glasgow; 1727, Gillach, Synod of Lothian; 1774, Frazer, Synod of Dumfries; 1763, Sangster, Synod of Aberdeen; 1739, Kemp, General Assembly; 1790, Telfer, General Assembly.

Answered: A parish schoolmaster holds a civil office; he is appointed and paid by laymen, and he possesses no ecclesiastical character. All matters relating to his interest should therefore be cognisable by the civil courts.

The judgment of the church-court can affect patrimonial interest only when it is dependent on the ecclesiastical character. When this is wanting, no connection with the church, however intimate, will vest a jurisdiction in its courts, even as to officers appointed by themselves, and acting in their own presence; 17th November 1785, Rutherford against Presbytery of Kirkcaldy; 27th July 1756, Harvie against Bogle.

During the first centuries of the Christian æra, the church pretended to no civil jurisdiction. In the course of the dark ages, they usurped it in many cases; and that they should have done so with regard to schools, is not surprising, when it is considered that the clergy were the only persons capable of teaching, and, with few exceptions, the only persons ambitious of being taught; and that the schools were maintained out of the funds of the church.

But at the Reformation, the church-courts were stripped of their civil jurisdiction; and although various attempts have been since made to recover it, they have uniformly proved unsuccessful; Spottiswood, p. 185. 190. 195. The Forms of church-policy were rejected; Spottiswood, p. 150.; Calderwood, p. 24. The Acts of Assembly in 1565, and 1567, do not state the jurisdiction of the superintendents as a matter of right, but of expediency, as a future regulation; and they were not confined to this subject.

The act 1567, c. 11. rejected the other demands of the clergy; but declared, That schoolmasters, &c. should be tried by the superintendents. This jurisdiction, however, they were to exercise not as an ecclesiastical court, but as parliamentary commissioners. The act does not proceed upon the narrative of there being any antecedent right in the church; the office of superintendent was never sanctioned by the Legislature; Spottiswood, p. 258. Besides, though it was abolished by the General Assembly in 1581, the jurisdiction of the superintendents, as to schoolmasters, &c. was confirmed by act 1581, c. 99. And there is no instance of an appeal from them to the church-courts.

Both the Church and the Legislature seem to have considered the act 1567 in this light. The former afterwards made frequent applications for, but were refused that jurisdiction, which the opposite opinion supposes to have been conferred by that act; Spottiswood,

Spottiswood, p. 382. ; while, at the same time, various commissions for the visitation of schools, &c. were appointed by the Crown; 1577, 1578, 1590.

During Episcopacy, while the bishop, with consent of the hearers, assessed the parishioners for maintaining the schoolmaster persons aggrieved were directed to apply to the Privy Council which shows that the bishops did not act in an ecclesiastical capacity.

During the Usurpation, the Presbyterian church-government was restored ; but nothing was said as to the jurisdiction of the presbytery over schools.

In 1690, the church-government was put on its present footing ; yet a parliamentary commission was appointed for the visitation of colleges and schools ; 1690, c. 17.

The act 1693 was, as to this subject, just the appointment of a similar commission. It does not give a jurisdiction to the presbytery as a matter of right. If it had been passed in that view, it would have given them the same powers as to colleges which they formerly claimed.

The act is silent as to the right of reviewing the judgments of the presbytery. Where that power lies must be determined from the nature of the subject. The acts 1572, c. 48. and 1663, c. 21. upon which depends the jurisdiction of the presbytery as to kirks, manse and glebes, and the acts 1597, c. 272. ; 1600, c. 19. ; 1606, c. 13. and 1685, c. 20. conferring certain branches of jurisdiction on kirk-sessions, are in the same situation. Yet, merely from the nature of the subject, a power of review has always been, and can only be exercised by the Court of Session. For the same reason if the judgments of the presbytery in the present instance are not final, they can only be reviewed by this Court ; Dalr. 18th January 1710, Strachan ; Act of Assembly 1700, c. 10. ; 29th June 1769, Hastie against Campbell.

Besides, the jurisdiction of the ecclesiastical courts was evidently meant to be excluded. That part of the act which relates to the admission of ministers gives a jurisdiction to the General Assembly, and " the other judicatories of the church ;" but when it speaks of the jurisdiction of the presbytery, as to schools, these words are purposely omitted.

The question of jurisdiction has never been tried by the church-courts. In the cases quoted, the higher Court judged by reference or prorogation.

So far as relates to the professional skill of a candidate, this Court perhaps would not chuse to interfere with the judgments of the presbytery, but in various other matters, for instance, if the presbytery should depose a schoolmaster for cruelty to his scholars, there would be no impropriety in this Court reviewing their judgment.

The Lord Ordinary reported the cause on informations ; and the Lords, 25th May 1792, remitted it *simpliciter*.

A reclaiming petition was followed with answers, and memorials were ordered by the Court. At advising which, three separate opinions were entertained on the Bench.

One Judge *observed*: When a schoolmaster is once vested with the office, the trial of his deportment may be considered as a judicial act, subject to review; but the trial of his qualifications before admission, is purely ministerial, and cannot be reviewed. A court of review can only proceed upon what was done by the inferior court; and therefore, if such a power had been intended, the Legislature would have directed the whole procedure to be recorded.

The rest of the Judges were clear that the proceedings of the presbytery were not final in either case, because nothing short of an express enactment of the Legislature can vest an inferior court with an ultimate jurisdiction. Upon this principle (it was *observed*) it has been determined, that the judgments of the Commissioners of Supply, although they act under a parliamentary commission, are not final. But they were not agreed as to the court to whom the appeal was competent.

Some Judges said, that questions with regard to schoolmasters, had always been held to be of ecclesiastical cognizance; that it was on this account that jurisdiction was given to the presbytery by the act 1693, the words of which are merely declaratory; and that in order to give the higher church-courts a right to review their judgments, it was no more necessary that it should be mentioned in the statute, than it would be in an act conferring jurisdiction on the Sheriffs or Justices of the Peace, to mention the controuling power of the Court of Session.

A majority, however, were of opinion, that as all civil power had been taken from the clergy at the Reformation, and as the office and character of a schoolmaster were in no respect ecclesiastical, all questions relating to them fell to be determined by the civil courts. That in the act 1693, the presbytery were not considered as an ecclesiastical court, but merely as a body of men, in whom that power might with propriety be vested, subject to the controul of this Court; in the same manner, as in their jurisdiction with regard to manse and glebes, or as in that of the kirk-session on other points.

The Court, May 21. 1793, altered the interlocutor reclaimed against, and “ found, That the sentence of the presbytery was not final, but that the power of review lay in this Court, and not in the superior church-judicatories; and therefore advocated the cause, and remitted to the Lord Ordinary to proceed accordingly, and to do further as he should see just.”

And upon advising a reclaiming petition and answers, “ the Lords adhered.”

Lord Ordinary, *Justice-Clerk*. For Allan, Dean of Faculty Erskine, Jo. Millar junior.
Alt. Solicitor-General Blair, M. Ross, W. Robertson. Clerk, Sinclair.

D. D.

N° LXXV.

November 26. 1793.

The CREDITORS of JOHN BROUGH,

AGAINST

JAMES JOLLIE.

COMPENSATION,—RETENTION.—*A person purchasing a subject for another, in consequence of a commission from him, and, with his consent, taking the rights to it in his own name, is entitled to retain it, in competition with the other creditors of his constituent, till he is relieved of all cautionary obligations which he has undertaken for him.*

IN 1786, James Jollie, writer to the Signet, in virtue of a verbal mandate from John Brough, purchased for him, at a public auction, an area at the price of L. 2200. The enactment of roup was, with Brough's consent, made out in Jollie's name, who became personally bound to pay the price, and fulfil the conditions of the sale.

Brough soon after paid the price of the area, and erected a large building on it.

In 1784, Jollie became cautioner for Brough, to the extent of L. 500; and in 1787, for L. 500 more.

Brough having become bankrupt in 1788, Jollie contended, that he was entitled to retain the area, and building erected upon it, till he should be relieved of both these cautionary engagements. His right to do so was disputed by Brough's other creditors, who

Pleaded: As Mr Jollie holds the subject merely as mandatary for Brough, he is bound to restore it free from all incumbrances, except those flowing directly from the commission under which he acted, such as the expence of management. That commission was precise in its terms, and limited in its object; and as it also implied exuberant confidence, retention can be no more pleaded in consequence of it, than it could against the *actio depositi*; Dic. vol. i. p. 163. and 164. vol. iii. p. 87.; Stair, b. i. tit. 18. § 6—Fac. Coll. 10th December 1760, Competition of Appin's Creditors.

In the case, 27th January 1791, Harper against Faulds, it was determined that goods put into the hands of an artisan, in order to be manufactured, cannot be retained by him for any other debt, except the expence of the operation. It would be singular therefore, if, in the contract of mandate, which implies a great degree of trust than the *locatio conductio operarum*, the mandatary should be so far entitled to invert the nature of his possession,

to retain the subject he was employed to purchase, till he should be relieved of all the separate obligations in which he was either previously bound, or which he should afterwards come under on his account.

Answered: When a person is disabled by bankruptcy from discharging the obligations he owes to another, he cannot demand performance of what that other owes to him; and the solvent party is entitled to retain, for his security, any effects of the bankrupt he may have got into his possession, especially if he is cautioner for the bankrupt, because he is at all times entitled to insist on being relieved from his obligation, even although he has not been distressed for payment of the debt; Erskine, b. 3. tit. 4. § 20. and 21.; Macdowal, b. 1. tit. 24. § 34.; Stair, 18th February 1662, Earl Bedford against Lord Balmerinock, stated in Dict. vol. i. p. 594.; Voet. de Institor. Act. lib. 14. tit. 3. § 9.; Kames's Principles of Equity, 3d edit. vol. ii. p. 102. Neither does it make any difference whether the cautionary obligation has been undertaken by him before or after his obtaining the subject over which he claims a right of retention; Fount. 10th July 1711, Irving against Menzies; June 1710, Martin against the Creditors of Archibald*; Kames, 19th June 1744, Murray against Chalmers.

Besides, from the great length of time during which Brough allowed the property to continue in the defender's name, it is evident that it came into his hands not in consequence of a simple mandate, but that Mr Brough must have intended it to remain with him in trust, for his relief of all obligations in which he might be engaged for him.

Replied: Retention has never been sustained for relief of cautionary obligations, unless on the footing of previous consent between the parties, either direct or implied, of which, in the present case, there is no evidence; Fount. 1st July 1709, Strachan against the Town of Aberdeen; Kilker. 24th December 1746, Balfour against Lazini.

The Lord Ordinary reported the cause on informations.

The Court, 5th June 1793, sustained the claim of retention.

On advising a reclaiming petition and answers, it was

Observed on the Bench: Mr Jollie, whether considered as a mandatary or trustee, is not bound to denude till relieved of his cautionary obligations. In the case Harper against Faulds, the goods were put into the hands of an artificer, merely to perform a certain operation upon them, under an implied obligation to restore them whenever it was finished, upon receiving the price of

* Not collected.

of his labour. It was therefore, thought, that he could not be entitled to hold them as a pledge or security for debt in general but it was admitted, that cautioners, factors, or trustees, stood upon a different footing.

The Court unanimously “adhered to the interlocutor reclaim-
“ed against, in so far as it sustained the claim of retention main-
“tained for James Jollie, reserving to the parties to be heard
“how far individual tradesmen, creditors of the said John
“Brough, had a right to insist against Mr Jollie for payment of
“work done, or materials furnished by them to the subjects in
“question, and also reserving to the creditors at large to insist
“against him for repayment of the original purchase-money of
“the area, without prejudice to any defences competent to him
“against these claims.”

Lord Ordinary, *Dreghorn*.

For the Objectors, *Solicitor-General Blair, Patison*—

For Jollie, *Dean of Faculty Erskine, Cullen*.

Clerk, *Mitchelson*.

R. D.

N° LXXVI.

November 27. 1793.

ALEXANDER LESLIE,

AGAINST

ROBERT CUMMING.

SERVITUDE.—The extent of a predial servitude is to be regulated by the proper uses of the dominant tenement.

BY a contract entered into in 1723, between the fathers of Cumming of Logie and Leslie of Balnakeith, on which indentment followed, it was stipulated, that “the tenants, occupiers and possessors” of the lands of Balnakeith, resident thereon, should be entitled to take “for their own proper use, accommodation and conveniency,” peat and other fuel from the mosses of Mr Cumming, on payment of six bolls of barley yearly, but that they should have no right to sell or give away the same to others.

In a process of declarator, Mr Leslie claimed under this contract a right to fuel, for the purpose of burning lime for sale, and also for malting, brewing and distilling for sale grain not the produce of the lands of Balnakeith.

The defender

Pleaded: Servitudes, as being burdens on property, receive a strict interpretation, and are limited to those ordinary uses of the subject which must have been in the view of the parties when they were constituted. Hence a servitude of fuel cannot be extended to any manufacture which may require an extraordinary supply; Erskine, b. 2. tit. 9. § 34.

When a predial servitude is constituted in general terms, its extent is to be regulated by the proper uses of the dominant tenement, and cannot be stretched to a right of selling the object of the servitude to others; l. 1. § 1. *de serv. præd. rust.*; l. 5. § 1. *ib.*; l. 47. *de obl. et act.*; Bankton, b. 2. tit. 7. § 1. Indeed, such an enlargement of the right cannot even be acquired by prescription; Kames, 22d November 1732, Inhabitants of Dunse against Hay of Drummelzier; 1772, Sir John Hall against William Nisbet*.

The nature of the servitude in question is ascertained by the words in which it is constituted, and by the consideration given for it, which is a reasonable one, if the servitude be limited to the domestic uses, and the manufacture of the produce of the dominant tenement, but is quite inadequate, if it is to be exercised to the extent now claimed.

Answered: Although servitudes are said to be constituted for the use of the dominant tenement, they are intended for the use of those to whom the dominant tenement belongs, and may be as various in their nature and extent as the uses to which they may have occasion to apply them; Stair, b. 2. tit. 7. § 9.; Voet, § 12. *de serv. præd. rust.*; Dict. v. Servitude, 27th November 1734, Garden against the Earl of Aboyne. The servitude in the present case is not confined to the domestic purposes, but extends to the use, accommodation, and convenience of the inhabitants of the dominant tenement; its object was to put them in the same situation as if the mosses had belonged to their landlord, with this exception, that they should not be allowed to sell or give them away to others; and it is intended to apply them not to any new or extraordinary manufacture, but in a manner known and established at the date of the contract.

The Lord Ordinary, in substance, found and declared in terms of the libel.

Upon advising a reclaiming petition, with answers, the Court, being of opinion that the cause involved an important point of law, ordered memorials on the import and extent of the servitude. At advising which, it was

Observed on the Bench: With us, as in the civil law, the extent of a servitude in favour of a *prædium rusticum*, must in general be regulated by the uses proper to the dominant tenement, and there seems to be nothing in the use and wont here to take the case out of the general rule †.

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* Not collected.

† Parties differed as to the possession which had taken place under the contract. As to distilling, at least, there could be no legal possession before the late act of Parliament, allowing small stills to be erected in the Highlands.

The Lords unanimously found, That the pursuer and the possessor of the estate of Balnakeith were entitled to peats and fuel from the mosses and muirs belonging to the funder, for all family-purposes, and for drying, malting, and singeing the grain of their own lands, and burning limestone for the use of the lands, and other accommodations of the like, but not to burn limestone for sale, nor to carry on a brewing or distilling for sale.

Lord Ordinary, *Justice-Clerk*. A&C. *Chas. Hay*. Alt. *Solicitor-General Blair*.
Clerk, *Gordon*.

N° LXXVII.

November 27

JOHN MURRAY, and other preferable Creditors on the part of John Rae.

AGAINST

DAVID BLAIR, and others, his postponed Creditors.

COMPETITION.—RANKING and SALE.—*If in consequence of the bankruptcy of purchasers or otherwise, after the subjects are sold, a scheme of division is made up, but before the price is distributed, the loss falls entirely upon the creditors.*

THE heritable property of John Rae was sold to two purchasers.

One of them and his cautioner afterward became bankrupt, and being unable to fulfil the terms of the purchase, the property was again sold, but at a reduced price.

The judicial factor on the estate also died bankrupt, leaving a considerable balance in his hands.

Previously to these occurrences, a scheme of division had been made up, upon the supposition that the whole property would be sold to the two purchasers.

scheme. The preferable creditors, on the other hand, maintained, that they had still a right to full payment of their debts; and

Pleaded: By the act 1681, c. 17. judicial sales are only declared effectual on payment of the price, which is to be divided among the creditors, according to their preferences. Till the price is paid, the rights of the creditors continue a burden upon the estate; and if the purchaser become bankrupt, they remain a legal ground for bringing it again to sale. The creditors, therefore, who were preferable on the price at the first judicial sale, will also be preferable at the second; and if a smaller price is got, the loss must fall upon the postponed creditors.

Answered: If it could be precisely known previously to the judicial sale, what part of the price each creditor was to draw, the purchaser would immediately either pay to each creditor the specific sum he was entitled to, or grant him a bond for it. But as the sale must be over before each creditor's interest in the price can be ascertained, this plan cannot be followed. The purchaser, however, does what is equivalent. He grants a single bond, obliging himself to pay the price to the creditors respectively, as they shall be preferred by the decree of ranking. As soon therefore as each creditor's debt or dividend is ascertained, a proportional part of the bond becomes his absolute property; and if it should afterward be lost, it must perish *suo domino*. See Appendix, No. III. Fac. Coll., 17th November 1792, Brown against York-buildings Company.

Further, by 1690, c. 20. it is declared, that if there shall be no purchasers, the Court may divide the land among the creditors. Now, although the share of a preferable creditor were to be destroyed by an earthquake, he could not have recourse on the portions of the postponed creditors. And the same rule must hold where each creditor, in place of becoming proprietor of part of the estate, becomes proprietor of part of the price.

Replied: The bond granted by a purchaser, whether it is considered as an obligation in favour of the creditors *pro indiviso*, or as divided among them in certain proportions, is merely corroborative of the securities held by them before the sale.

The distribution of the land among the creditors is not similar to the present case, because that is equivalent to an actual payment and division of the price.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: The estate does not effectually belong to the purchaser till he pay the price. Till then the securities of the creditors remain entire, and of consequence the subject continues pledged to the preferable creditors, to the full amount of their debts. This is not inconsistent with what was found in the case of Brown against the York-buildings Company.

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The Court unanimously found, "That the creditors who stand preferentially ranked upon the different funds, as established by the decree of ranking, are now entitled to draw their payment ~~in~~ out of these funds; and that any loss which has arisen thereupon since the original sale of Mr Rae's estate in 1771, falls upon the postponed creditors."

Lord Ordinary, Craig. For the preferable Creditors, Macintosh. Alt. Hay-
Clark, Macintosh.

R. D.

N^o LXXVIII.

November 28. 1793.

CHRISTIAN CALLMAN,

AGAINST

HAMILTON BELL.

HYPOTHEC.—*An agent's hypothec over the papers of his client, found not to extend to the proceedings in a process which he had been employed to conduct.*

CHRISTIAN CALLMAN employed Hamilton Bell, writer to the Signet, to raise a process of declarator of marriage and legitimacy, at the instance of herself and her daughter, against Janet Gourlay, sister and (as she alleged) representative of the late Robert Gourlay, to whom Mrs Callman said she had been married. She also employed Mr Bell to take out an edict in the name of her child, for serving her executrix, as nearest of kin to her deceased father. The same step was taken by Janet Gourlay who contended, that she ought to be preferred to that office; and after some litigation, she prevailed before the Commissaries.

Mr Bell, on the part of his client, brought their judgment under review, by a bill of advocation, which was refused.

At this stage of the action, Christian Callman notified to Mr Bell, that she was to change her man of business; and insisted that he should deliver up to her the bill of advocation, writings produced, and the whole procedure which had taken place upon it in the bill-chamber, and also the process of declarator which was going on in the Commissary-court.

Mr Bell refused to comply with this demand, upon the ground of his having a right of hypothec over the whole papers in his possession, till he should get payment of the account due to him as her agent.

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Upon this Christian Callman obtained a caption against him, **for** not returning the bill of advocation, &c. into the hands of **the** clerk.

Mr Bell having presented a representation, praying that it **sh**ould be recalled, the Lord Ordinary on the bills found, "That
 " an agent is not entitled to stop procedure in a depending pro-
 " cess, by withholding the steps of process from his client or the
 " clerk; as his hypothec only extends over title-deeds, securi-
 " ties, and other documents properly belonging to his client;
 " and therefore refuses to recal the caption, so far as it applies
 " to the recovery of the steps of process, either before the Com-
 " missary-court or this Court."

Mr Bell presented a petition, reclaiming against this judgment; **in** which he founded on the case, 28th January 1784, Scott a-
gainst Lothian*.

Observed on the Bench: An agent, so far from having an hypo-
thec over the steps of a process, is not even entitled to retain title-
deeds or other writings of his client, of which he has got posses-
sion merely in consequence of their having been produced in it.
But if they were in his hands prior to their production, as in the
case of Scott against Lothian, he will not on that account lose his
hypothec over them. In the case of Forsyth against Sym †, 18th
February 1791, the claim of hypothec was repelled in circum-
stances similar to the present.

The petition was unanimously refused, without answers.

Lord Ordinary, *Esqgrove*. For the Petitioner, *W. Stewart*. Clerk, *Menzies*.

R. D.

* Not collected.

† Not collected.

N^o LXXIX.

November 29. 1793.

JAMES and JOHN WALLACES,

AGAINST

JAMES BARRIE.

BILL OF EXCHANGE.—PRESUMPTION.—*A false description in gremio of a bill, of the value given for it, does not annul it. The presumption of law, that the acceptor has got value, can only be taken off by writ or oath of party.*

JAMES BARRIE *junior* accepted a bill for L. 25 Sterling, drawn on him by James and John Wallaces, payable three months after date, and bearing to have been granted for “value received in flax.” It was afterward indorsed by the drawers, and by them discounted with the branch of the Dundee bank at Forfar.

The acceptor died before the bill became due, and it was retired by the drawers, who soon after brought an action for repayment against James Barrie *senior*, the acceptor’s father, as representing his son.

Barrie stated in defence, 1st, That although the bill bore to have been granted for value in a specific commodity, no value of any kind had been received; and that therefore it was void, as containing a falsehood *in gremio*.

2^{dly}, That although his son, as acceptor, was apparently the debtor, yet, in fact, it was an *accommodation* bill, in which he had joined for the sole behoof of the drawers, who accordingly discounted it, and employed the money for their own purposes. And that the pursuers not having allowed the bill to be protested against themselves before retiring it, and their never having claimed the debt during the illness of the acceptor, although they must have seen the propriety of clearing up the transaction, if it had been a fair one, during his lifetime, afforded presumptive evidence of the truth of this averment.

The pursuers admitted, that no value had been given to Barrie *junior*, at the time he accepted the bill; but they affirmed, that they had discounted it for his behoof, and immediately after delivered the money to him, and contended, That in all bills, the presumption of law is, that the acceptor is the principal debtor: That with regard to accommodation-bills in particular, unless some general rule were adopted for ascertaining who should be ultimately liable for them, such transactions would often be inextricable; and that although circumstances perhaps might be

be imagined so strongly in favour of the acceptor as to obviate the legal presumption, none such occurred in the present case.

The Lord Ordinary decerned in terms of the libel.

On advising a reclaiming petition, with answers, it was

Observed on the Bench: The law presumes, that the acceptor gets value for the bill; and this presumption can only be taken off by writ or oath of party. It does not signify whether value is given when the bill is drawn, or only afterwards, when it is discounted. Indeed, in accommodation-bills, the value is seldom given till the latter period. The only difficulty in the present case arises from the false description of the value, which is too common a practice, and is resorted to in order to make the banker believe the bill had its origin in a real transaction. This circumstance, however, will not annul a bill, provided value of any sort is either actually received, or in law presumed to have been received.

The Court by a great majority adhered.

Lord Ordinary, Justice-Clerk.
Clerk, Home.

A&C. G. Robertson-Scott.

Alt. J. Buchan-Hepburn.

R. D.

N^o LXXX.

November 29. 1793.

ANDREW FERGUSON,

AGAINST

ROBERT YOUNG.

BILL OF EXCHANGE.—PRESUMPTION.—*A bill having a receipt in general terms on the back of it, is presumed to have been paid by the acceptor.*

ROBERT YOUNG accepted a bill drawn by Robert Steel junior and Company, payable 100 days after date, which the drawers afterward discounted with the Falkirk Banking Company.

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When it became due, it was retired by Thomas Steel, one of the partners of Steel and Company, who took a receipt from the cashier of the bank in the following terms: "Received payment of the within."

Thomas Steel died soon after, and the retired bill having been found in his repositories, it was assigned by Robert Steel, his partner, to Andrew Fergusson, in security of a Company-debt.

Fergusson raised an action against Young the acceptor, for payment of its contents.

Young *pleaded* in defence, That he had put the money with which Thomas Steel had retired the bill into his hands for the express purpose, and that this action was a fraudulent and collusive attempt to make him pay the debt twice. And in support of this allegation, he founded upon the nature of the receipt granted by the bank, contending, That wherever a bill appears with receipt on the back of it in general terms, not mentioning to whom it was paid, the presumption of law is, that it has been retired by the acceptor the proper debtor, or at least with his money; and that this presumption can only be removed by his writ or oath: That if Thomas Steel had retired the bill with his own funds, he would, in order to have preserved his recourse against the defender, have, according to the usual practice, taken a receipt, bearing that its contents had been paid by himself.

It was *answered* for Fergusson, That it was highly improbable that Young, a man conversant in business, would have given money to one of the drawers to pay the bill, without taking a receipt for it; and that since he had not, it was incumbent on him to establish the fact by proof; and that the discharge by the creditor, however loosely worded, could not cut off the drawer's right of relief against the acceptor.

The Lord Ordinary *affoizied* the defender.

On advising a reclaiming petition, with answers, it was

Observed on the Bench: When a bill is retired by a person primarily liable for it, he will always take care to get a specific receipt. A receipt in general terms, like the one in question, operates as an extinction of the debt in favour of the acceptor unless the contrary is proved by his writ or oath.

The Court unanimously adhered.

Lord Ordinary, *Ankeruille*. *Aët. Corbet.* *Alt. C. Hay.* *Clerk, Menzies.*

c. 26. and these statutes do not take it away, either directly or by implication. A single judgment of the House of Peers is not necessarily a precedent which this Court is bound to follow. Besides, the case of Ogilvie related to the landlord's hypothec over the fruits of the ground, and not to that over the *invecta et illata*.

The Lord Ordinary found, "That the different statutes founded on by the officers of the Excise, go no farther than to give the Crown a preference for the revenue-duties, in a competition with the personal creditors of the bankrupt, and do not infringe on the landlord's right of hypothec, as established by the laws of Scotland before the Union."

On advising a reclaiming petition and answers, several of the Judges considered the question as determined by the judgment of the House of Peers, in the case of Ogilvie; but at the same time expressed regret at that decision, as they still thought that the landlord's hypothec, as a *real* right, was saved from the prerogative process of the Crown.

On the other hand, it was observed, that by the express words of the 6 Queen Anne, real *estates* only were saved from the Crown's preference, and declared attachable in no other form than according to the rules of the Scots law. That a mistake had arisen by confounding a real *right* in the landlord, with a real *estate* in the debtor, the latter of which alone came within the reservation of the statute; and that consequently, although the landlord's hypothec might be a real right in him, yet the subject over which it extended was personal, and as such liable to the preference of the Crown.

Some of the Judges were of opinion, that the Crown's preference was also established by the statutes Cha. II. and Geo. III.; for as these statutes (it was observed) had made it preferable even to a right of property, it must also be preferable to every subordinate right of hypothec.

The Court, by a great majority, "sustained the petitioner's preferences in behalf of the Crown."

Lord Ordinary, *Ankerville*.
Alt. Honyman.

For the Crown, *Lord Advocate Dundas*.
 Clerk, *Mitchelson*.

R. D.

N° LXXXII.

December 4. 1793.

ANDREW BULLIONS,

A G A I N S T

JAMES BAYNE and JOHN HEPBURN.

HUSBAND AND WIFE.—A deed executed by a married woman, which is null for want of her husband's consent, does not become valid on being ratified by him after her death.

JOHAN GUERNSEY, a soldier, husband of Margaret Bullions, went with his regiment upon foreign service.

After he had been absent about five years, she gave out that he was dead, and married James Bayne, to whom she disposed gratuitously, or at least only under burden of paying the debts affecting them, which were not equal to their value, certain heritable subjects belonging to her.

The subjects were sold by Bayne to John Hepburn.

After the death of Margaret Bullions, John Guernsey returned, and ratified her disposition in favour of Bayne.

In a reduction of this ratification, and of the dispositions in favour of Bayne and Hepburn, Andrew Bullions, the heir at law,

Pleaded: The husband is the curator of his wife, and in that character his consent is essential to all her deeds, even to those by which his interest is not affected; Ersk. b. 1. tit. 6. § 27.; Reg. Maj. b. 1. c. 30.; b. 2. c. 36.; Balf. Pract. p. 95.; Craig, b. 1. d. 12. § 28.; Stair, b. 1. tit. 4. § 15.; Sir George Mackenzie, b. 1. tit. 6. § 11.; Bankt. vol. i. p. 124. § 67.; Dict. vol. i. p. 400. *et seq.* The want of it cannot be supplied by a ratification afterwards granted by him; Spottiswoode, p. 155. 12th February 1556, Melville; Dict. vol. i. p. 402.; Durie, 19th December 1626, Matthew against Sibbald; Fount. 23d February 1698, Lady Cochran against the Duchess of Hamilton; Bankt. b. 4. tit. 45. § 40. And at all events, such ratification, after his office of curator and his interest in her estate are dissolved by her death, can have no effect.

Answered: The consent of a husband to his wife's deeds is not required, from the idea that she, like a pupil, is incapable of acting for herself, but solely on his account; Ersk. b. 1. tit. 6. § 27.; Fount. 17th July 1711, Pringles; Dict. vol. i. p. 401. 21st February 1679, Cockburn against Burn. Although therefore his consent be not adhibited, they are not *ipso jure* null, but liable to exception at his instance; Ersk. ib. § 23. which the ratification bars the husband in the present case from pleading, all imperfect deeds

deeds which create a natural obligation being capable of homologation; Ersk. b. 3. tit. 3. § 47.

Besides, the necessity of the case was sufficient to give validity to the disposition granted by Margaret Bullions; Ersk. b. 1. tit. 6. § 27.; Bankt. b. i. tit. 5. § 67.; Dict. vol. i. p. 402.

The Lord Ordinary reported the case on informations.

Observed on the Bench: A married woman is *sub cura mariti*, and on that account her deeds are null without his consent. If she survive her husband, she may either ratify them, or bring them under reduction. But the consent of the husband, after his office of curator is at an end, can have no effect; his marital power has then ceased, and a *jus quæsitum* arisen to her heirs.

The Lords unanimously reduced in terms of the libel.

Lord Ordinary, *Henderland*.
Clerk, *Colquhoun*.

Ald. *Cullen*.

Alt. Geo. *Fergusson*.

D. D.

N° LXXXIII.

December 7. 1793.

JAMES and WILLIAM DUFFS,

AGAINST

LAURENCE SUTHERLAND.

SUMMARY APPLICATION.—*When a magistrate illegally refuses to imprison a debtor, or detains money consigned in his hands, redress may be obtained by a summary petition and complaint.*

THOMAS GORDON having been by decree-arbitral ordained to pay a sum of money to James and William Duffs, on receiving certain papers from them specified in the decree, he was apprehended on a caption at their instance, and presented to Laurence Sutherland, one of the Bailies of Elgin, for imprisonment; Gordon, in his presence, offered to pay the money, provided the papers were delivered to him. The creditors were present, but had not the papers in their possession. Gordon then consigned the money with Sutherland, to remain in his hands till the papers were delivered, upon which the latter refused to imprison him.

The Duffs afterwards made a summary application to the Court in which they complained of these and certain subsequent steps
Sutherland

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Sutherland's conduct, particularly of his detaining the money after the papers were delivered, on pretence of an arrestment executed in his hands by Gordon, on the dependence of a reduction of the decree-arbitral which had been raised by him.

The defender objected to the competency of the complaint, contending, that in so far as it related to his refusal to imprison Gordon, an ordinary action ought, according to the practice in similar cases, to have been brought against him, and that the propriety of his detaining the money could only be determined in a multiple-poining.

The complainers, on the other hand, stated, that the ground of their complaint, being the alleged malversation of a public officer in the execution of his duty, warranted the present application; *Kilk. v. Summary Application, Angus against Ferrier.*

The Court, upon advising the petition and complaint, with answers, replies and duplies, unanimously "sustained the complaint."

A&C. Wolfe Murray, J^a. Gordon.
Clerk, Gordon.

Alt. M. Rofs.

D. D.

N^o LXXXIV.

December 10. 1793.

Sir JOHN OGILVY, and others,

AGAINST

CATHARINE MERCER, and others.

DEATHBED.—DIES INCEPTUS.—*A deed reduced as made on deathbed, where the granter survived its execution fifty-nine days and three hours.*

IMPLIED WILL.—*How far two deeds making part of the same family-settlement, and executed, the one without and the other within the sixty days, affect one another, as partes ejusdem negotii.*

TESTAMENT.—QUOD POTUIT NON FECIT.—*Dispositive words are necessary, in order to convey heritage.*

ROBERT MERCER, on the 22d February 1791, at eight o'clock in the evening, executed a deed of entail of his lands of Lethindy, in favour of Catharine Mercer his niece, and various substitutes.

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substitutes. He died on the 22d April thereafter, betwixt ten and eleven o'clock at night.

Mr Mercer, when he executed the entail, had contracted the disease of which he died, and he did not afterwards go either to kirk or market.

Sir John Ogilvy and others, his heirs at law, (as representing deceased sisters,) brought an action against Miss Mercer, and the other substitutes in the entail, for setting it aside, because Mr Mercer had not survived its execution for the space of sixty days in terms of the act 1696, c. 4. In defence, Miss Mercer first

Pleaded: The law of deathbed, as being a restraint on the freedom of disposal which is the essence of the right of property, must be strictly interpreted; 11th December 1787, Taitzour. And whatever may have been the case at a former period of society, when perhaps, had it not been for this law, the clergy would have employed their influence with dying persons, in prevailing on them to leave their fortunes to pious uses, to the prejudice of their near relations, and when it was the object of the law to prevent as much as possible the vassal from alienating his benefice without the consent of his superior, Craig, b. 1. c. 3. § 36.; Stair, b. 4. tit. 20. § 38.; Remarkable Decisions, p. 114; the present age, no plea of expediency can be urged in its favour. The act 1696, therefore, though correctory in its nature, yet being highly expedient in itself, ought to receive that interpretation which is most consonant to its spirit, and most favourable to the granter of the deed, for whose benefit it was intended; Maclezie's Observations, p. 410.; Remarkable Decisions, p. 174.

Now, reckoning from the 22d February, the date of the entail to the 22d April, the day of Mr Mercer's death, he lived 61 days after its execution. It is true, the sixtieth day was not complete; but *dies inceptus in favorabilibus pro completo habetur*. This maxim is strongly founded in reason, and clearly established in law; Stair, b. 2. tit. 8. § 34.; Fountainhall, Stair, February 1680, and 7th June 1681, Weddel; Stair, 26th January 1681, Lady Bangour against Hamilton; Fountainhall, 30th June 1762, Wilton against Haddo; Fac. Coll. 15th January 1762, Elliot against Ferguson; January 1781, Telfers against Ferrier, mentioned in Wight's Treatise of Election Law, p. 221.; in the civil law, Voet, lib. 44. tit. 3. § 1.; Vinn. ad. Inst. lib. 1. tit. 23. p. 100.; lib. 1. t. 3. l. 6. et 7. ff. de usurp. et usucap.; lib. 44. t. 3. l. 1. princip. de divers. temp. prescrip.; Grotius Comment. on Matt. c. 12. v. 40. lib. 40. t. 1. l. 1. ff. de manumissionibus; and like in the law of England, Viner, vol. 20. p. 269. voce Time.

It is seldom possible to ascertain with perfect accuracy the precise moment at which any given event or transaction took place, and when in order to make it effectual, it is necessary that it should have happened at a particular period, the cast of the balance is *in dubio* to be given where the favour lies. Accordingly, in the civil law, lib. 28. t. 1. l. 5. ff. qui test. fac. post. lays it down, if one born on the 1st January make his will on the 31st December of his fourteenth year, at any time after midnight,

will be valid, which is, in other words, saying, that the day of birth and that of executing the deed were both to be reckoned in making up the period of fourteen years, the age which was required in a male before he could make a testament. Indeed, it is a general rule in all cases where the period is fixed by days, and favourably computed, to avoid fractions, to hold the parts of the beginning and ending days as whole by referring the act from which the period commenced to the first moment of the day, without enquiring at what hour it happened; and the act, which is the *terminus ad quem*, in the same manner, to the last moment; Viner, vol. 2. p. 268. The "year and day," so often required in our law, was established from the known effect of the maxim *dies inceptus*, &c. as it is universally agreed, that the day is added solely in order to secure the full completion of the year. But this would have been unnecessary, had it not been understood, that otherwise the commencement of the last day of the year would in many cases have been insufficient. The act 1696, however, does by no means demand, that in order to have the benefit of it, a person should live to the sixty-first day; and as the Legislature could not suppose that a man would just survive to a moment sixty full days, the currency of the sixtieth, which happened in the case in question, must be all that is required.

Answered: There is no occasion to resort either to the influence of the Romish clergy, or to feudal customs, to discover the origin of the law of deathbed. From the most ancient authority in our law, it appears to have been introduced as a promise to dying persons against the artifices of those around them; *Reg. Maj. lib. 2. c. 18. § 7.* Both on this account, therefore, in preserving the succession to the natural heir, it has been approved of by our most eminent writers; Dirr. *voce Legitimarum*; Craig, *lib. 1. d. 12. § 36.*; *lib. 2. d. 1. §§ 18. 28.*; Stair, tit. 20. §§ 38. 41. and 44.; Macdowall, vol. 2. p. 412. § 17.; 1. § 32.; Erskine, b. 3. tit. 8. § 95.; and in judging of deaths stated against the plea of the heir, a strict interpretation has uniformly been adopted; Durie, 7th January 1624, Shaw; 15th July 1637, Lord Cranston, Riddell against Richardson; Spotiswoode, *voce Heirs*, 30th July 1635, Heir of Pencaitland against Fairlie.

Since acts equipollent to going to kirk and market unsupported, are not admitted as equally probative of convalescence; 7th February 1671, Lawrie against Drummond; 28th June 1671, Creditors of Balmerino against Lady Coupar; 25th November 1687, Keirie against Craigen; 5th and 6th December 1672, Clelands against Cleland; Dict. vol. 1. *voce Deathbed*, p. 218. and 219.; Stair, b. 3. § 28.

And for the same reason the Court have given a rigorous interpretation of what shall be held as going to kirk and market, so as to avoid the objection of deathbed; Durie, 7th July 1629, Maxwell against Fairlie; Dict. *voce Deathbed*, p. 217.; Marcus, (*Let. ag.*), 17th January

substitutes. He died on the 22d April thereafter, betwixt ten and eleven o'clock at night.

Mr Mercer, when he executed the entail, had contracted the disease of which he died, and he did not afterwards go either to kirk or market.

Sir John Ogilvy and others, his heirs at law, (as representing deceased sisters,) brought an action against Miss Mercer, and the other substitutes in the entail, for setting it aside, because Mr Mercer had not survived its execution for the space of sixty days, in terms of the act 1696, c. 4. In defence, Miss Mercer *first*

Pleaded: The law of deathbed, as being a restraint on that freedom of disposal which is the essence of the right of property, must be strictly interpreted; 11th December 1787, Tailziour. And whatever may have been the case at a former period of society, when perhaps, had it not been for this law, the clergy would have employed their influence with dying persons, in prevailing on them to leave their fortunes to pious uses, to the prejudice of their near relations, and when it was the object of the law to prevent as much as possible the vassal from alienating his benefice without the consent of his superior, Craig, b. 1. c. 12. § 36.; Stair, b. 4. tit. 20. § 38.; Remarkable Decisions, p. 114; in the present age, no plea of expediency can be urged in its favour. The act 1696, therefore, though correctory in its nature, yet being highly expedient in itself, ought to receive that interpretation which is most consonant to its spirit, and most favourable to the granter of the deed, for whose benefit it was intended; Mackenzie's Observations, p. 410.; Remarkable Decisions, p. 174.

Now, reckoning from the 22d February, the date of the entail, to the 22d April, the day of Mr Mercer's death, he lived sixty days after its execution. It is true, the sixtieth day was not complete; but *dies inceptus in favorabilibus pro completo habetur*. This maxim is strongly founded in reason, and clearly established in our law; Stair, b. 2. tit. 8. § 34.; Fountainhall, Stair, February 25. 1680, and 7th June 1681, Weddel; Stair, 26th January 1681, Lady Bangour against Hamilton; Fountainhall, 30th June 1694, Wilson against Haddo; Fac. Coll. 15th January 1762, Elliot against Ferguson; January 1781, Telfers against Ferrier, mentioned in Wight's Treatise of Election Law, p. 221.; in the civil law, Voet, lib. 44. tit. 3. § 1.; Vinn. ad. Inst. lib. 1. tit. 23. p. 100.; lib. 41. t. 3. l. 6. et 7. ff. de usurp. et usucap.; lib. 44. t. 3. l. 15. ff. princip. de divers. temp. prescrip.; Grotius Comment. on Matthew, c. 12. v. 40. lib. 40. t. 1. l. 1. ff. de manumissionibus; and likewise in the law of England, Viner, vol. 20. p. 269. voce Time.

It is seldom possible to ascertain with perfect accuracy the precise moment at which any given event or transaction took place; and when in order to make it effectual, it is necessary that it should have happened at a particular period, the cast of the balance in *dubio* to be given where the favour lies. Accordingly, Ulpian. lib. 28. t. 1. l. 5. ff. qui test. fac. post. lays it down, that if one born on the 1st January make his will on the 31st December of his fourteenth year, at any time after midnight, the

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deed will be valid, which is, in other words, saying, that the day of the birth and that of executing the deed were both to be reckoned in making up the period of fourteen years, the age which the law required in a male before he could make a testament.

Indeed, it is a general rule in all cases where the period is measured by days, and favourably computed, to avoid fractions, and to hold the parts of the beginning and ending days as whole days, by referring the act from which the period commenced to the first moment of the day, without enquiring at what hour it really happened; and the act, which is the *terminus ad quem*, in like manner, to the last moment; Viner, vol. 2. p. 268.

The "year and day," so often required in our law, was established from the known effect of the maxim *dies inceptus*, &c. as it is universally agreed, that the day is added solely in order to secure the full completion of the year. But this would have been unnecessary, had it not been understood, that otherwise the commencement of the last day of the year would in many cases have been sufficient. The act 1696, however, does by no means declare, that in order to have the benefit of it, a person should live part of the sixty-first day; and as the Legislature could not suppose that a man would just survive to a moment sixty full days, the currency of the sixtieth, which happened in the case in question, must be all that is required.

Answered: There is no occasion to resort either to the influence of the Romish clergy, or to feudal customs, to discover the foundation of the law of deathbed. From the most ancient authority in our law, it appears to have been introduced as a protection to dying persons against the artifices of those around them; *Reg. Maj. lib. 2. c. 18. § 7.* Both on this account, therefore, and as preserving the succession to the natural heir, it has been approved of by our most eminent writers; *Dirl. voce Legitima liberorum*; Craig, *lib. 1. d. 12. § 36.*; *lib. 2. d. 1. §§ 18. 28.*; Stair, *b. 4. tit. 20. §§ 38. 41. and 44.*; Macdowall, vol. 2. p. 412. § 17.; *p. 301. § 32.*; Erskine, *b. 3. tit. 8. § 95.*; and in judging of defences stated against the plea of the heir, a strict interpretation has uniformly been adopted; Durie, 7th January 1624, Shaw; 1st July 1637, Lord Cranston, Riddell against Richardson; Spotwoode, *voce Heirs*, 30th July 1635, Heir of Pencaitland against Sinclair.

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Now, reckoning from the 22d February, the date of the entail to the 22d April, the day of Mr Mercer's death, he lived sixty days after its execution. It is true, the sixtieth day was not complete; but *dies inceptus in favorabilibus pro completo habetur*. This maxim is strongly founded in reason, and clearly established in our law; Stair, b. 2. tit. 8. § 34.; Fountainhall, Stair, February 25 1680, and 7th June 1681, Weddel; Stair, 26th January 1681, Lady Bangour against Hamilton; Fountainhall, 30th June 1694 Wilton against Haddo; Fac. Coll. 15th January 1762, Elliot against Ferguson; January 1781, Telfers against Ferrier, mentioned in Wight's Treatise of Election Law, p. 221.; in the civil law Voet, lib. 44. tit. 3. § 1.; Vinn. ad. Inst. lib. 1. tit. 23. p. 100.; lib. 41. t. 3. l. 6. et 7. ff. de usurp. et usucap.; lib. 44. t. 3. l. 15. ff. princip. de divers. temp. prescrip.; Grotius Comment. on Matthew c. 12. v. 40. lib. 40. t. 1. l. 1. ff. de manumissionibus; and likewise in the law of England, Viner, vol. 20. p. 269. voce Time.

It is seldom possible to ascertain with perfect accuracy the precise moment at which any given event or transaction took place; and when in order to make it effectual, it is necessary that it should have happened at a particular period, the cast of the balance is *in dubio* to be given where the favour lies. Accordingly, Ulpian. lib. 28. t. 1. l. 5. ff. qui test. fac. post. lays it down, that if one born on the 1st January make his will on the 31st December of his fourteenth year, at any time after midnight, the deed

deed will be valid, which is, in other words, saying, that the day of the birth and that of executing the deed were both to be reckoned in making up the period of fourteen years, the age which the law required in a male before he could make a testament.

Indeed, it is a general rule in all cases where the period is measured by days, and favourably computed, to avoid fractions, and to hold the parts of the beginning and ending days as whole days, by referring the act from which the period commenced to the first moment of the day, without enquiring at what hour it really happened; and the act, which is the *terminus ad quem*, in like manner, to the last moment; Viner, vol. 2. p. 268.

The "year and day," so often required in our law, was established from the known effect of the maxim *dies inceptus*, &c. as it is universally agreed, that the day is added solely in order to secure the full completion of the year. But this would have been unnecessary, had it not been understood, that otherwise the commencement of the last day of the year would in many cases have been sufficient. The act 1696, however, does by no means declare, that in order to have the benefit of it, a person should live part of the sixty-first day; and as the Legislature could not suppose that a man would just survive to a moment sixty full days, the currency of the sixtieth, which happened in the case in question, must be all that is required.

Answered: There is no occasion to resort either to the influence of the Romish clergy, or to feudal customs, to discover the foundation of the law of deathbed. From the most ancient authority in our law, it appears to have been introduced as a protection to dying persons against the artifices of those around them; *Reg. Maj. lib. 2. c. 18. § 7.* Both on this account, therefore, and as preserving the succession to the natural heir, it has been approved of by our most eminent writers; *Dirl. voce Legitima liberorum*; Craig, *lib. 1. d. 12. § 36.*; *lib. 2. d. 1. §§ 18. 28.*; Stair, *b. 4. tit. 20. §§ 38. 41. and 44.*; Macdowall, *vol. 2. p. 412. § 17.*; *p. 301. § 32.*; Erskine, *b. 3. tit. 8. § 95.*; and in judging of defences stated against the plea of the heir, a strict interpretation has uniformly been adopted; Durie, 7th January 1624, Shaw; 1st July 1637, Lord Cranston, Riddell against Richardson; Spottiswoode, *voce Heirs*, 30th July 1635, Heir of Pencaitland against Sinclair.

Hence acts equipollent to going to kirk and market unsupported, are not admitted as equally probative of convalescence; Stair, 7th February 1671, Lawrie against Drummond; Gofford, 28th June 1671, Creditors of Balmerino against Lady Coupar; Fountainhall, 25th November 1687, Keirie against Craigenfelt; Stair, 5th and 6th December 1672, Clelands against Cleland; *Dict. vol. 1. voce Deathbed*, p. 218. and 219.; Stair, *b. 3. tit. 4. § 28.*

And for the same reason the Court have given a rigorous interpretation of what shall be held as going to kirk and market, so as to avoid the objection of deathbed; Durie, 7th July 1629, Maxwell against Fairlie; *Dict. voce Deathbed*, p. 217.; Marcus, (*Lect. ag.*),
January

substitutes. He died on the 22d April thereafter, betwixt ten and eleven o'clock at night.

Mr Mercer, when he executed the entail, had contracted the disease of which he died, and he did not afterwards go either to kirk or market.

Sir John Ogilvy and others, his heirs at law, (as representing deceased sisters,) brought an action against Miss Mercer, and the other substitutes in the entail, for setting it aside, because Mr Mercer had not survived its execution for the space of sixty days in terms of the act 1696, c. 4. In defence, Miss Mercer *first*

Pleaded: The law of deathbed, as being a restraint on that freedom of disposal which is the essence of the right of property, must be strictly interpreted; 11th December 1787, Tailziour. And whatever may have been the case at a former period of society, when perhaps, had it not been for this law, the clergy would have employed their influence with dying persons, in prevailing on them to leave their fortunes to pious uses, to the prejudice of their near relations, and when it was the object of the law to prevent as much as possible the vassal from alienating his benefice without the consent of his superior, Craig, b. r. c. 12. § 36.; Stair, b. 4. tit. 20. § 38.; Remarkable Decisions, p. 114; in the present age, no plea of expediency can be urged in its favour. The act 1696, therefore, though correctory in its nature, yet being highly expedient in itself, ought to receive that interpretation which is most consonant to its spirit, and most favourable to the granter of the deed, for whose benefit it was intended; Mackenzie's Observations, p. 410.; Remarkable Decisions, p. 174.

Now, reckoning from the 22d February, the date of the entail, to the 22d April, the day of Mr Mercer's death, he lived sixty days after its execution. It is true, the sixtieth day was not complete; but *dies inceptus in favorabilibus pro completo habetur*. This maxim is strongly founded in reason, and clearly established in our law; Stair, b. 2. tit. 8. § 34.; Fountainhall, Stair, February 25. 1680, and 7th June 1681, Weddel; Stair, 26th January 1681, Lady Bangour against Hamilton; Fountainhall, 30th June 1694, Wilson against Haddo; Fac. Coll. 15th January 1762, Elliot against Ferguson; January 1781, Telfers against Ferrier, mentioned in Wight's Treatise of Election Law, p. 221.; in the civil law, Voet, lib. 44. tit. 3. § 1.; Vinn. ad. Inst. lib. 1. tit. 23. p. 100.; lib. 41. t. 3. l. 6. et 7. ff. de usurp. et usucap.; lib. 44. t. 3. l. 15. ff. princip. de divers. temp. prescrip.; Grotius Comment. on Matthew, c. 12. v. 40. lib. 40. t. 1. l. 1. ff. de manumissionibus; and likewise in the law of England, Viner, vol. 20. p. 269. voce Time.

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deed will be valid, which is, in other words, saying, that the day of the birth and that of executing the deed were both to be reckoned in making up the period of fourteen years, the age which the law required in a male before he could make a testament.

Indeed, it is a general rule in all cases where the period is measured by days, and favourably computed, to avoid fractions, and to hold the parts of the beginning and ending days as whole days, by referring the act from which the period commenced to the first moment of the day, without enquiring at what hour it really happened; and the act, which is the *terminus ad quem*, in like manner, to the last moment; Viner, vol. 2. p. 268.

The "year and day," so often required in our law, was established from the known effect of the maxim *dies inceptus*, &c. as it is universally agreed, that the day is added solely in order to secure the full completion of the year. But this would have been unnecessary, had it not been understood, that otherwise the commencement of the last day of the year would in many cases have been sufficient. The act 1696, however, does by no means declare, that in order to have the benefit of it, a person should live part of the sixty-first day; and as the Legislature could not suppose that a man would just survive to a moment sixty full days, the currency of the sixtieth, which happened in the case in question, must be all that is required.

Answered: There is no occasion to resort either to the influence of the Romish clergy, or to feudal customs, to discover the foundation of the law of deathbed. From the most ancient authority in our law, it appears to have been introduced as a protection to dying persons against the artifices of those around them; *Reg. Maj. lib. 2. c. 18. § 7.* Both on this account, therefore, and as preserving the succession to the natural heir, it has been approved of by our most eminent writers; *Dirl. voce Legitima liberorum*; Craig, *lib. 1. d. 12. § 36.*; *lib. 2. d. 1. §§ 18. 28.*; Stair, *b. 4. tit. 20. §§ 38. 41. and 44.*; Macdowall, *vol. 2. p. 412. § 17.*; *p. 301. § 32.*; Erskine, *b. 3. tit. 8. § 95.*; and in judging of defences stated against the plea of the heir, a strict interpretation has uniformly been adopted; Durie, 7th January 1624, Shaw; 1st July 1637, Lord Cranston, Riddell against Richardson; Spottiswoode, *voce Heirs*, 30th July 1635, Heir of Pencaitland against Sinclair.

Hence acts equipollent to going to kirk and market unsupported, are not admitted as equally probative of convalescence; Stair, 7th February 1671, Lawrie against Drummond; Gofford, 28th June 1671, Creditors of Balmerino against Lady Coupar; Fountainhall, 25th November 1687, Keirie against Craigen-gelt; Stair, 5th and 6th December 1672, Clelands against Cleland; *Dict. vol. 1. voce Deathbed*, p. 218. and 219.; Stair, *b. 3. tit. 4. § 28.*

And for the same reason the Court have given a rigorous interpretation of what shall be held as going to kirk and market, so as to avoid the objection of deathbed; Durie, 7th July 1629, Maxwell against Fairlie; *Dict. voce Deathbed*, p. 217.; Marcus, (*Let. ag.*),
January

N° LXXXVI.

December 18. 1793.

The DISPONEES of George Steel,

A G A I N S T

D A V I D W E M Y S S.

BILL OF EXCHANGE.—*Is a bill or promissory note granted as a reward for services and trouble effectual?—A gratuitous draught on a banker is valid.*

GEORGE STEEL, on the 16th February 1790, granted to David Wemyss, “as a consideration for his services and trouble,” a promissory note for L. 500, payable at the following Whitsunday.

In payment of which he, on the 7th June, gave him the following draught, addressed to the Secretary of the Bank of Scotland “On sight pay to David Wemyss, or his order, Five hundred pounds Sterling, which place to my account, without further advice.”

Neither the promissory note nor the draught were holograph of Mr Steel, or attested by witnesses.

Mr Wemyss did not present the draught at the Bank till after Mr Steel’s death, (24th June 1790), when payment was refused.

The disponees of Mr Steel then brought a reduction of the promissory note and draught.

The services condescended on, as performed to Mr Steel by Mr Wemyss, were, assistance in the general management of his affairs and particularly of a large farm which he kept in his natural possession, and which his advanced age, it was said, prevented him from superintending.

The disponees denied that these services had been performed and further

Pleaded: Bills and promissory notes are exempted from the solemnities required in other writings, only where they are used as the medium of commerce, which is their proper object. When granted without an onerous cause, or for the delivery of goods and for the same reason, when granted as a reward for services and trouble, for which the granter was under no legal obligation they are altogether ineffectual; Dict. v. Bill of Exchange, 13th February 1724, Hutton against Hutton; 9th November 1722, Fulton and Clerk against Blair; 3d December 1736, Parkhill against Weir; 11th February 1761, Wright against Wrights.

The draught is not only liable to the same objection with the promissory note, but it does not create the same presumption of value received. Such draughts are frequently given to servant merely

deed will be valid, which is, in other words, saying, that the day of the birth and that of executing the deed were both to be reckoned in making up the period of fourteen years, the age which the law required in a male before he could make a testament.

Indeed, it is a general rule in all cases where the period is measured by days, and favourably computed, to avoid fractions, and to hold the parts of the beginning and ending days as whole days, by referring the act from which the period commenced to the first moment of the day, without enquiring at what hour it really happened; and the act, which is the *terminus ad quem*, in like manner, to the last moment; Viner, vol. 2. p. 268.

The "year and day," so often required in our law, was established from the known effect of the maxim *dies inceptus*, &c. as it is universally agreed, that the day is added solely in order to secure the full completion of the year. But this would have been unnecessary, had it not been understood, that otherwise the commencement of the last day of the year would in many cases have been sufficient. The act 1696, however, does by no means declare, that in order to have the benefit of it, a person should live part of the sixty-first day; and as the Legislature could not suppose that a man would just survive to a moment sixty full days, the currency of the sixtieth, which happened in the case in question, must be all that is required.

Answered: There is no occasion to resort either to the influence of the Romish clergy, or to feudal customs, to discover the foundation of the law of deathbed. From the most ancient authority in our law, it appears to have been introduced as a protection to dying persons against the artifices of those around them; *Reg. Maj. lib. 2. c. 18. § 7*. Both on this account, therefore, and as preserving the succession to the natural heir, it has been approved of by our most eminent writers; *Dirl. voce Legitima liberorum*; Craig, *lib. 1. d. 12. § 36.*; *lib. 2. d. 1. §§ 18. 28.*; Stair, *b. 4. tit. 20. §§ 38. 41. and 44.*; Macdowall, *vol. 2. p. 412. § 17.*; *p. 301. § 32.*; Erskine, *b. 3. tit. 8. § 95.*; and in judging of defences stated against the plea of the heir, a strict interpretation has uniformly been adopted; Durie, 7th January 1624, Shaw; 1st July 1637, Lord Cranston, Riddell against Richardson; Spottiswoode, *voce Heirs*, 30th July 1635, Heir of Pencaitland against Sinclair.

Hence acts equipollent to going to kirk and market unsupported, are not admitted as equally probative of convalescence; Stair, 7th February 1671, Lawrie against Drummond; Gofford, 28th June 1671, Creditors of Balmerino against Lady Coupar; Fountainhall, 25th November 1687, Keirie against Craigen-gelt; Stair, 5th and 6th December 1672, Clelands against Cleland; *Dict. vol. 1. voce Deathbed*, p. 218. and 219.; Stair, *b. 3. tit. 4. § 28.*

And for the same reason the Court have given a rigorous interpretation of what shall be held as going to kirk and market, so as to avoid the objection of deathbed; Durie, 7th July 1629, Maxwell against Fairlie; *Dict. voce Deathbed*, p. 217.; Marcus, (*Lect. ag.*),
January

N° LXXXVII.

December 21. 1793.

Sir JAMES COLQUHOUN,

A G A I N S T

The Duke of MONTROSE and others,

A N D

The MAGISTRATES of Dumbarton.

PUBLIC POLICE.—*No length of possession can authorise any obstruction to the navigation of a public river.*

SALMON-FISHING.—*A right of salmon-fishing cannot be exercised by means of nets extending across the river, and supported by stakes stuck into its channel.*

SIR James Colquhoun has a right of salmon-fishing in Lochlond and the river Leven, which his predecessors had, for some time prior to the 1760, (how long, was disputed, and was the subject of proof), been accustomed to exercise by means of masking nets, the meshes of which were from six to eight inches wide. These nets were put loose into the water, a little above the mouth of the river, and reached as near the shore on each side as there was depth of water for a coble. They were sunk on the one side with flates, and kept up on the other by cork; and to prevent their being carried down the stream, they were supported by, but not fastened to stakes stuck into the channel at certain distances from each other, leaving an empty space of about twenty feet in the middle, in order to allow boats to pass.

In 1760, this fishing was let to an English Company, who made several alterations in the mode of conducting it. The stakes were now brought much closer to each other, and nets of a much stronger texture, and narrower in the mesh than those formerly used, were fastened to them both at top and bottom. Besides, at one place there was an opening left in the nets, by which the salmon were allowed to get into a *stell*, i. e. a complete inclosure of stakes and close nets, from which the salmon could escape only at the place of their entry.

Certain heritors claiming a right of salmon-fishing in Lochlond, or the river of Enrick, which runs into it, brought an action of declarator, complaining of the injury done to the fishing, and the obstruction in the navigation of the river, occasioned by this practice.

The =

Answered: Every heritor on the banks of a river, unless in so far as restrained by positive regulation, has a right of occupancy in the salmon it contains, which he may exercise as he thinks proper. None of the enactments on this subject were meant to regulate the rights of individuals. Their object was, as a matter of police, to prevent the breed of salmon from being destroyed; and so great is their fecundity, that provided the fry are preserved, there is no occasion, for this purpose, to take charge of the grown salmon. Accordingly, no mode of catching the latter, whether by cruives or otherwise, though some of them have been subjected to regulations; has ever been prohibited as illegal; Kames's Statutes Abridged, Alexander II. c. 16. Robert I. c. 12.; 1477, c. 73.; 1489, c. 15. while on the other hand certain practices, destructive of the former, have been altogether forbidden, 1424, c. 10.; 1457, c. 85.; 1469, c. 37.

The act 1581, c. 111. did not prohibit cruives in general; and it appears from the statute 1685, that a person claiming a right to them must be infest in a right of salmon-fishing, which by possession may be explained to be a right to cruives, in the same manner as a right of fishing in general may be extended to a right of salmon-fishing. For the same reason, Sir James has acquired right to the fishing in question, which is of an inferior sort to that of cruives, and being prohibited by no statute cannot be illegal; Stair, 26th January 1665, Heritors of Don.

Observed on the Bench: Every heritor, through whose lands a public river runs, has a right to all the ordinary uses of it; but the channel is *juris publici*. The Crown may give a right of salmon-fishing, but it can give no right of placing any permanent obstruction in the channel. The fishing claimed being on that account illegal, every heritor has a right to prevent, and no length of time can authorise its continuance.

The Crown may indeed, under certain regulations, and which are intended partly for the benefit of the heritors, grant a right of cruives. This, however, is to be considered as an exception from the common law. The pursuer (Sir James) has no express grant of cruipe-fishing, neither has he had possession of it, it is unnecessary, therefore, in this case to enquire how far such right may be acquired by prescription. Besides, the fishing in question is nearly as detrimental to the salmon as the mode which the former interlocutor of the Court declared to be on that account illegal. Stent-nets have been declared so; Fount. 10. February 1693, Heritors of Don; 19th November 1771, Duke of Queensberry against Marquis of Annandale *.

The Court almost unanimously, " In respect the title of the Magistrates and Town-council of Dumbarton to insist in the present action against Sir James Colquhoun has been already sustained, found it unnecessary *in hoc statu* to determine upon the title of the other pursuers: Found, That Sir James Colquhoun having produced no right to a cruipe-fishing, he is not entitled

" to

* Not collected.

“ to exercise his right of fishing by stobs and nets, as claimed by
 “ him previous to the year 1760, nor to interrupt the navigation
 “ either in the water Leven, or in the mouth of Lochlomond;
 “ and in so far decerned and declared in the action at the instance
 “ of the town of Dumbarton; and in the action of declarator at the
 “ instance of Sir James Colquhoun, assoilzied the Magistrates
 “ and Town-council of Dumbarton from the whole conclusions
 “ thereof, and decerned; but remitted to the Lord Craig Ordinary,
 “ to hear the other parties thereupon, and to proceed and deter-
 “ mine as to his Lordship shall seem just.”

Lord Ordinary, *Craig*.

For Sir James Colquhoun, *Dean of Faculty Erskine*,

Geo. Fergusson. Alt. *Solicitor-General Blair*, *Rolland*, *Morthland*. Clerk, *Gordon*.

D. D.

N° LXXXVIII.

January 15. 1794.

HELEN DOUGLAS,

AGAINST

Her CREDITORS.

Cessio bonorum.—*Aliment*.—*A person imprisoned for damages and expences awarded in an action of defamation, found entitled to the benefit of a Cessio bonorum,—and allowed to retain a part of her jointure for her aliment.*

HELLEN DOUGLAS, widow of James Baillie, Esq; having been imprisoned by Elizabeth Chalmers, for damages and expences awarded in an action at her instance, for defamation, brought a process of *Cessio bonorum* against her creditors.

In the summons, she stated, that her chief fund for paying her debts was a life-rent-provision settled on her by her contract of marriage, and she concluded, that she should be allowed a part of it for her aliment.

The sums due to the other creditors were trifling, and opposition was made only by Elizabeth Chalmers; who contended, that the pursuer's insolvency having arisen *ex delicto*, she was not entitled to the benefit of the *Cessio*.

The Court, after hearing parties, ordered memorials, in which the defender

Pleaded:

DECISIONS OF THE

Pleaded: By the rules of common law, a debtor in an obligation of any sort can only be liberated on specific performance, or the voluntary discharge of the creditor, and must remain subject to legal compulsion, till the one or other is obtained; *Aul. Geb. Noct. att. lib. 20. c. 1.*; Stat. 2. Rob. I. c. 19. § 5.

The privilege of *Cessio bonorum*, which is borrowed from the Roman law, and which is known only in those countries which have adopted its system, (Blackst. vol. ii. p. 473. 475.) is to be viewed as an exception, introduced from considerations of equity. With us, as with the Romans, it is competent only when the insolvency has been occasioned by innocent misfortune, but is denied not only where, as in the present case, it has arisen from delinquency, and particularly when the application is opposed by the person against whom the offence has been directed; *Vcet. lib. 42. tit. 3. § 5.*; *ff. l. 1. § 3. de pœnis, ib. l. 35. de inj. et fam.*; *ib. l. 37. § 1. de min.*; Kames, 19th November 1751, Malloch; 9th August 1781, Stewart against Macglashan; 19th December 1789, Shaw*; but even where it has been occasioned by gross folly and neglect; 12th July 1785, Macgibbon; 10th March 1786, Frazer.

Upon this principle, although the act 1696, c. 32, obliged creditors to aliment indigent prisoners, it was under the express exception, that prisoners for criminal causes should be in the same state as formerly; 24th February 1768, Wright against Taylor; Dict. voce Prisoner, 23d November 1738, Macleslie.

Answered: Imprisonment for debt is permitted by the law of Scotland, solely with the view of forcing a fair surrender of effects, and can be continued no longer than is absolutely necessary for that purpose; Stair, b. 4. tit. 52. § 31.; Kames's Principles of Equity, 3d edit. vol. ii. p. 26. The privilege of *Cessio bonorum* has accordingly been recognized from the earliest periods; *Quon. Att. c. 7. § 3. Stat. Gulielmi c. 17.* It is not competent to those whose insolvency is occasioned by fraud or gross negligence; because, those who have thus dissipated the money of others, are, in law, presumed still to have it in their possession. It is not competent to persons ordered to prison till payment of a sum, although to an individual; but this does not arise from the right of the creditor but because the sentence of the law must be literally fulfilled that case, in the same manner as if it had ordained a corporal punishment. But wherever there is no concealment of effects, either real or presumed, and the debtor is imprisoned on ultimate diligence, at the instance of his creditors, he is entitled to benefit of the *Cessio*, whether the ground of debt has arisen *in tractu*, or *ex delicto*; 18th February 1764, Small against Sir J Clerk; 5th March 1791, M'Dowall against Moliere. If the debtor had been of opinion that the offence merited imprisonment according to the magnitude of the offence, and limited its duration by a creditor, in order to gratify his resentment, to inflict imprisonment limited only by the life of his debtor.

* Not collected.

The act of grace has little connection with the present subject. Its sole object was to free the public from the expence of maintaining persons imprisoned at the instance of individuals; and all in that situation are entitled to its benefit, whatever may have been the cause of their imprisonment; 7th December 1787, Clark against Johnston and the Procurator-Fiscal of Mid-Lothian. Even fraudulent bankrupts are entitled to it; 27th May 1790, Aitken against Gray.

Observed on the Bench: When a person is imprisoned *in modum ena*, he cannot be entitled to the benefit of the *Cessio*; but where images are awarded against him *civiliter*, though arising *ex delicto*, the decree puts the parties into the situation of debtor and creditor to each other. The debt is a civil one, and the refusal of the *Cessio* could only be justified on the supposition, that the offence warranted perpetual imprisonment. When the pursuer of a *Cessio* has used the money of his creditors, he must account to them in the manner in which it has been employed, and he will not be allowed to state in his condescendence any loss occasioned by juggling, or other illegal means. But the pursuer in this case has no property of creditors to account for. Upon this principle, the case of Moliere was decided.

The act of grace applies wherever the imprisonment is at the instance of an individual, whatever be the ground of the obligation. In some early cases this seems not to have been sufficiently understood.

The Court unanimously found the pursuer entitled to the benefit of the *Cessio*.

Against the pursuer's claim for aliment, the defender

Pleaded: The pursuer of a *Cessio bonorum*, even in the most favourable cases, must assign to his creditors all the transferable property of which he is possessed, and will be allowed to retain a part for his aliment, only where such reservation is necessary for the performance of professional duty.

Answered: As the pursuer's fund for payment of her creditors depends upon her life, and she is unfitted both by age and education from earning her subsistence by labour, she must be allowed to retain a part of her income for her aliment.

It is now completely understood, that an officer on half pay, or in general any person who has a certain rank in society to support, is entitled to do so, and that the creditors cannot attach what the donor has declared to be alimentary. As the pursuer is the widow of a gentleman, and her funds are intended for her aliment, she cannot be in a worse situation.

Observed on the Bench: When the fund of payment depends upon the life of the debtor, creditors will not be allowed to act

emulously and contrary to their own interest, by depriving him of the means of subsistence.

The Court unanimously ordained the pursuer to give in a disposition *omnium bonorum*, with the reservation of L. 45 yearly out of her annuity for her aliment, until her debts be paid.

A&C. Dean of Faculty Erskine, Cullen, Tait, D. Douglas. Alt. Geo. Fergusson, James Fergusson junior. Clerk, Home.

D. D.

Notes. In estimating the *quantum* of aliment, the Court had in view both the extent of the pursuer's funds, and of the debt due by her.

Her funds consisted of L. 372, 10s. with some interest due upon it, and of L. 115 *per annum*, during her life.

The debt due to the incarcerating creditor was, for damages,	-	L. 100	0	0
For expences of process,	-	688	0	0
Expence of extract, .	-	106	13	8
L. 894 13 8				

The Court had found Mr Baillie, the pursuer's husband, conjunctly liable with her for the expence of process, and of extract, (Fac. Coll. 19th February 1790); but in consequence of a remit from the House of Peers, the obligation against him was restricted to L. 500 of the expence of process, and a proportional part of that of extract. L. 100 was afterwards deducted on account of certain counter claims which he had against the defender. The question of aliment was determined on the 8th February 1794.

Pleaded: Draughts like the present are very frequently granted by creditors on their debtors, whether bankers or individuals, and when paid by the drawee, they operate as a discharge in favour, upon whatever terms the bearer may have got possession of them. But they have not the same privilege of negotiation with bills or promissory notes. When transferred to a third party, all objections competent against the cedent may also be pleaded against the assignee, as in the case of a bond or other personal security; Erskine, b. 3. tit. 5. §§ 6. 10.; Bacon's Newbridgment, vol. iii. p. 603. 609. Indeed, there being no rules for their negotiation, as there are with regard to bills, no hardship would arise from giving them the same privileges.

They were evidently considered by the Legislature as having effect only in favour of the first holder, and not transferable bills, otherwise it would not have exempted from the stamp-duty orders on bankers, drawn by persons residing within a certain distance of the banking-house, while it expressly declared all orders not payable to the bearer, liable to these duties; 23 Geo. III. c. 1. § 4.; 24 Geo. III. sess. 1. c. 7. § 3. Indeed, on the contrary position, the tax might be evaded in all bills payable on demand.

Besides, bills payable to the bearer are null, as falling under the statute 1696, c. 25.; Dict. v. Blank Writ, 8th January 1730, in *Kinshaw's Executors*.

Observed on the Bench: The draught in question is transferred like a bill of exchange. It is equally free from compulsion with a bank-note. It falls under the class of "notes of trade companies," which are exempted from the enactments of the act 1696. Besides, the drawer having issued his order in due terms, is barred *personali exceptione* from objecting to the negotiability of it, and the trustee for his creditors cannot be in a better situation.

The Lords unanimously "refused the petition," without answers.

Lord Ordinary, *Justice-Clerk*.

For the Petitioner, *John Clerk*.

Clerk, *Simon*.

D. 1



N^o XC.

January 16. 1794.

MATTHEW COMB and others,

AGAINST

The MAGISTRATES of Edinburgh.

TITLE TO PURSUE.—25 Geo. II. c. 9.—*An action of declarator and damages against the Magistrates of Edinburgh, sustained at the instance of certain brewers, complaining of inequality in levying the duty of two pennies Scots on the pint of ale and beer.*

THE MAGISTRATES of Edinburgh, by an unprinted act, dated 13th June 1693, are authorized to levy a duty of two pennies Scots “upon the pint of ale and beer to be brewed and ~~in-~~ brought, or vended, tapped, and sold within the said town, “and suburbs and liberties thereof.” This duty was to continue during the space of 15 years, and further during their Majesties pleasure, not exceeding the space of 30 years, as a just time and space calculated for the payment and discharge of the Town’s debt.

By the act, the Magistrates are directed to keep distinct accounts of the produce of the tax, and overseers are appointed to superintend their conduct in the execution of it.

By the 3d of Geo. I. this duty was continued for 19 years, after the expiry of the former statute; and additional overseers were appointed to act in concert with those named by the first act.

This duty was renewed by the 9th of Geo. I. and afterwards by an act passed in the 25th year of his late Majesty, which is still in force.

Matthew Comb, and certain other brewers liable in the duty, having raised an action of declarator and damages against the Magistrates, in which they complained that the defenders, or the collectors appointed by them, levied this duty unequally from the different traders; and asserted, that while it was exacted from them to its full amount, other traders were either totally or partially exempted, by which means the latter were enabled to undersell them at least 20 per cent. The Magistrates, in defence,

Pleaded: 1mo, The tax is the creature of statute, and every question relative to it must be regulated by statutable enactment. Unless, therefore, it can be shown that the acts of Parliament which empower the Magistrates to levy the duty, confer upon every individual burghers, *tanquam quilibet*, a right to call the defenders to account for their management, the pursuers can have

no such right at common law. Now, the acts of Parliament point overseers, in whom the power of controuling the conduct of the Magistrates is vested. It lies therefore with them, and not with any private party, to call the Magistrates to account.

Besides, it is a maxim of law, that no person is bound to answer as a defender in any case, or with any pursuer where an absolver will not afford him an *exceptio rei judicatæ* against a similar process, raised at the instance of any other person. Now, it is evident, that although the defenders were to be successful upon the merits in the present action, this absolver would not operate as a *res judicata* in any process brought against them by the overseers, in whom the title to pursue is vested by the statutes.

Answered : The pursuers, in consequence of the conduct of the defenders, have sustained a great patrimonial loss, and must therefore at common law be entitled to redress. Even ordinary burghesses are entitled to call Magistrates to account for their management of the revenue; Fac. Coll. 30th June 1752, Anderson against Magistrates of Renfrew. But the patrimonial interest of the pursuers, and consequently their title, is much stronger than that of ordinary burghesses, as they offer to prove that the favoured brewers are enabled to undersell them at least 20 per cent.

The overseers named by the acts of Parliament were appointed solely with the view of attending to the interest of the public, and not to that of private traders, who should be injured by the defenders in the collection of the duty. Indeed, so far as the action is brought for reparation of the damage which the pursuers have already sustained, it is evident that the overseers have neither title nor interest to insist in it; and it seems equally clear that the pursuers are entitled, by a declaratory conclusion, to guard themselves against a repetition of the injury.

The objection, that a decree of absolver from this process would not avail the defenders in a similar action, at the instance of different pursuers, does not apply to that part of the libel which concludes for repetition and damages. And at any rate, this objection has been over-ruled in other cases; Fac. Coll. 9th August 1765, Merchants Company and Trades of Edinburgh against the Governors of Heriot's Hospital.

The Lord Ordinary reported the cause on informations.

The Court sustained the pursuers title, and repelled the defences stated on this point.

Lord Reporter, *Dreghorn.*

A&C. Dean of Faculty *Erskine, Monypenny.*

Alt. Lord Advocate *Dundas, Neil Ferguson.*

Clerk, *Menzies.*

R. D.

N° XCI.

N^o XCI.

January 16. 1794.

THE INTERIM FACTOR on the sequestrated Estate of Bertram, Gardner and Company,

A G A I N S T

D A V I D T H O M S O N .

HYPOTHEC.—*An agent, whose client's estate was sequestrated, ordained to deliver the bankrupt's papers to his creditors, on receiving a warrant for payment of his account out of the funds in medio, as soon as it should be adjusted.*

BANKRUPT, 33 Geo. III. c. 74.—*The interim factor is entitled to possession of the oaths of verity and mandates produced for the creditors at the general meeting at which he is appointed.*

DAVID THOMSON, writer to the Signet, was agent for Messrs Bertram, Gardner and Company, and in that character had many of their papers in his possession. On their bankruptcy, he acted as clerk to the general meeting of creditors, at which Richard Hotchkis was appointed interim factor. The grounds of debt produced for the creditors were immediately returned to them, but their oaths of verity and mandates were left with Mr Thomson.

The interim factor having demanded from Mr Thomson the whole papers he held in his possession, whether as agent for the bankrupts, or clerk to the general meeting of creditors, under reservation of his right of hypothec Mr Thomson, though willing to allow inspection of them in his own hands, refused to quit possession of the former, until an account due to him by the bankrupts was paid, or at least an obligation granted for payment of it; and contended, that Mr Hotchkis was not entitled to possession of the latter, as they belonged to the creditors, and not to the bankrupts, of whose effects only he was appointed to take charge; 33 Geo. III. c. 74. § 15.

Upon this Mr Hotchkis presented a petition to the Lord Ordinary on the bills, to which his Lordship ordered answers to be lodged, and both to be presented to the Court.

The Lords “authorised the said Richard Hotchkis, as interim factor on the sequestrated estate of Bertram, Gardner and Company, and of John Gardner, Adam Keir, and Robert Forrester, individual partners of the said Company, and the trustee acting for the time upon the said estate, to make payment to
“ the

“ the said David Thomson out of the funds in their hands, of the
 “ amount of his accounts, as soon as the same are finally liqui-
 “ dated and adjusted ; and in the mean time ordained the said Da-
 “ vid Thomson instantly to deliver to the said Richard Hotchkiss
 “ the whole writings, vouchers, documents, books and papers of
 “ every kind, both of the creditors and of the bankrupts, or con-
 “ nected with their affairs.”

Lord Ordinary, *Aikervile*.

Clerk, *Pringle*.

D. D. —

N° XCII.

January 16. 1794.

JOHN GLASS,

AGAINST

The TRUSTEES for the CREDITORS of Charles Hutton—

COMPENSATION, RETENTION.—*A joint owner of a ship has a claim of preference or retention on it, for money advanced by him on its account, to the other proprietors, above his own share.*

CHARLES HUTTON, shipmaster in Culrofs, in consequence of a commission from John Glas, merchant at Stirling, purchased a vessel at Bergen in Norway, for their joint behoof.

John Glas advanced to Hutton a considerable sum more than his own half of the original price and expence of fitting out the vessel from that port. The vessel brought home a cargo, in which Hutton had no interest. A settlement afterwards took place between him and Glas, and a bill was granted for the balance due by the former ; and it was agreed, that upon payment of it, they should have equal right to the ship.

Glas likewise paid a farther sum for repairs made on the vessel after the voyage.

Hutton became bankrupt while the vessel was lying at Culrofs.

The trustees for his creditors agreed, that the property of the ship should be wholly transferred to Glas, at an appretiated value, which he became bound to make forthcoming to those who should be found to have best right to it.

He accordingly raised a multiple-pounding against the trustees, in which it was early established that he was entitled to retain one half of the value on his own account. He farther claimed a preference on the other half, *inter alia*, for the balance mentioned in the settlement, and for the furnishings made after the voyage; And

Pleaded: As the object of the parties, in purchasing the ship, was to earn profit by freights, and as the employment of it required skill, and was attended with risk, the connection between them came under the description of a joint adventure, just as much as if Hutton had had a share in the cargo. Each, therefore, had a preference on the stock over the private creditors of the other, for relief of the engagements he had undertaken on its account; *Ersk. b. 3. t. 3. § 29.* Each was proprietor *pro indiviso* of the common subject; and as he was personally liable for the whole charges attending it, the creditors of the other cannot insist in an action *communi dividundo*, without relieving him of one half of them.

Answered: Since the pursuer did not provide for his own security by a bill of bottomry or otherwise, he must be understood to have made the advances in question upon the personal credit of Hutton; and he has no more a real right in the ship, than if he had advanced money to him for the purchase of plate or household-furniture, he would have had upon these articles. If the money had been lent to Hutton, to enable him to purchase a ship solely for his own behoof, the pursuer would have had no preference upon it; and there seems no reason why he should in the present case be in a better situation.

The creditors of a Company, or joint adventure, are preferable on the stock to the private creditors of the partners; because it is in law held to belong to the Company itself, and not to the persons engaged, whose right is confined to a personal *jus crediti* against it. But this is not a case of joint adventure. Each had a real right in the ship to the extent of a half, and they were in the same situation with regard to each other, as the joint owners of any other subject, whether heritable or moveable.

Further, the pursuer has no claim of retention; because he cannot be held to have had possession of more than his own share of the ship. Hutton might certainly have disposed of his half at pleasure, and therefore he must have had power to transfer the possession of it to a purchaser.

The Lord Ordinary repelled the claim of preference.

But, upon advising a reclaiming petition and answers, the Lords, influenced both by the merits of the case, and the decision 16th June 1790, Roxburgh against Greig*, unanimously found Glass entitled to "a preference for the outlays and expence bestowed by him on the ship."

Lord Ordinary, *Henderland.*
Clerk, *Colquhoun.*

Akt. Maconochie.

Akt. Hay, Fletcher.

D. D.

* Not collected.

N° XCIII.

January 16. 1794.

JAMES CRAIG and WILLIAM HISLOP,

A G A I N S T

JOHN SPENCE, and others.

PERICULUM.—INSURANCE.—*A vessel, which strikes on a rock, and is got off again without being much damaged, is not held to be stranded.*

Loss arising from grain having been accidentally pumped out along with water from a leaky vessel, not held to be a general average.

A Cargo of grain originally belonging to James Craig, and by him sold to William Hislop, was insured on the voyage from Dantzic to Dumfries, by John Spence and other underwriters in Edinburgh. To the policy was subjoined, as usual, the following note: "*N. B.—Corn, feed, salt, fish, fruit, flour, and provisions of all kinds that are in their nature perishable, are warranted free from all average, unless general, or the ship be stranded.*"

In a storm, the vessel became leaky, and also shipped a quantity of water, some of which got among the grain. Along with the water, part of the grain was pumped out. The master at last found it necessary to sail for the harbour of Egoag in Norway, to refit. The vessel got into the harbour in the night-time, and after she had cast anchor, she got foul of another ship. In getting clear, she struck upon a rock; but in consequence of immediate assistance from the shore, she was got off; and it did not appear what, or if any damage was sustained by this accident. In order to repair the ship, it was found necessary that she should be unloaded. A part of the damaged grain was then sold for what could be got for it, and part of it thrown into the sea. After the vessel was repaired, and had been some months at Egoag, the remainder of the cargo was put on board, and the ship, without any further accident, arrived at the port of Dumfries.

In an action before the Court of Admiralty, the insured claimed from the underwriters the damage arising in consequence of the deficiency in the quantity of grain which arrived at Dumfries, from what had been originally put on board at Dantzic, deducting the price of what was sold at Egoag: And the Judge-Admiral gave judgment in their favour.

In

2do, The loss, in the present case, comes under the description of a general average. It was necessary, for the preservation of the ship, cargo and crew, that a part of the grain should be pumped out along with the water, for the pumps could not be wrought without doing so; and had they been stopped, the whole must have been lost. The unloading the vessel too, in order that she might be repaired, was a measure necessary for the general safety. And had it not been for this circumstance, the remainder of the cargo would have arrived at Dumfries. The necessity of disposing of a part at Egoag, may have arisen from damage received in unloading it, or from its having been improperly kept on shore.

The Lord Ordinary found, " That the defenders have not proved that the vessel was stranded; and in respect thereof, sustained the reasons of reduction."

Upon advising a reclaiming petition and answers, it was

Observed on the Bench: A vessel cannot be said to be stranded which only strikes against a rock, and is got off again, without considerable damage. There is no evidence in the present case that the damage was occasioned by the striking. When the *ipsius corpus* of the subject insured arrives at the end of the voyage, although in a damaged state, there is no general average. This had it not been for the voluntary act of the master, might have been the case here, except as to what was pumped out, which last having been lost accidentally, does not come under the description of a jetson, or give rise to a claim against the insurer.

" The Lords adhered."

Lord Ordinary, *Abercromby*.
Clerk, *Home*.

A&S. Solicitor-General *Blair*, *Rolland*.

Adv. M. R.

D. D.

N^o XCIV.

January 17. 1794.

ROBERT and ALLAN-JAMES BOGLES, and their FACTOR
loco tutoris,

AGAINST

GEORGE BOGLE, and others.

CAUTIONER.—*A cautioner for a tutor in law found liable for debts due by the tutor himself to his pupils, payable in his own lifetime, but not for those which only became payable at his death.*

ROBERT BOGLE, in the contract of marriage of his son Allan, became bound to pay him L. 6000 immediately on his marriage, and L. 4000 at the first term of Martinmas or Whitsunday after his (Robert's) death.

Allan Bogle afterwards died, leaving two sons, to whom Robert Bogle their grandfather was served tutor in law. On this occasion George Bogle his brother became surety, "that the said Robert Bogle shall make just count, reckoning, and payment to the said Robert and James *alias* Allan-James Bogle his grandchildren, pupils aforesaid, and to their heirs, executors or assigns, of his hails *intrusions* with their means, estate and effects, heritable and moveable, and of *what thereof he ought and should intrude with* by virtue of his office of tutory to them, and that *he shall faithfully exercise the said office.*"

At the time of Allan Bogle's death, there remained a balance of L. 3022 : 10 : 7 owing to him by his father, of the above L. 6000; and this sum, together with the L. 4000 payable at his own death, Robert Bogle inserted in the tutorial inventories.

Robert Bogle afterwards died insolvent; without having laid out or granted security for either of these sums. And a factor *loco tutoris* having been appointed to the grandchildren, he brought an action against Robert Bogle's representatives, and George Bogle his cautioner, for payment of them. In defence, the latter

Pleaded: The defender did not become cautioner for all the debts which Robert Bogle might owe to his son. The sums now sued for were due by him in a character altogether distinct from that of tutor, and the defender is no more bound to warrant them than any other debt in the tutorial inventories, which, without any fault of the tutor, may have been lost by the supervening bankruptcy of the debtor. The defender's obligation went no further than that his brother should faithfully account for all his *intrusions* with the estate of his grandchildren. But he did not *intrude* with either of the above sums. The L. 3022 : 10 : 7 were

were already in his hands when he accepted the office, and the other sum of L. 4000 he could not possibly intromit with, as it was not payable till after his death. If a creditor of the pupil had found it necessary to attach either of these sums for his security, it would have been competent to have arrested them in the hands of Robert, which proves, that he possessed them not in the character of *tutor* but of *debtor*. Or, if Robert had died a few days after the date of the bond of caution, without having taken any step in the character of tutor, the defender surely could not have been subjected in this claim, and there is no material difference betwixt that case and the present.

Answered : The defender not only became bound, that Robert Bogle should account for his *intromissions* with the estate of the pupil, but likewise that he should account for “*what he ought and should intromit with*,” and “*that he should faithfully exercise the said office*.” But even if his obligation had been limited to *intromissions*, the construction put upon that term is much too confined. By *intromissions* are understood, all that one person has got into his hands of the funds of another, and therefore it is of no moment that Robert Bogle, in place of getting the sums in question, by payment from others, after the commencement of the tutory, had them in his own hands before that time. The defender might as well plead, that no debt due to the pupil by third parties came under his obligation, although it should have been lost by the tutor’s negligence, unless the security had been at least once changed during the tutory ; for it was the duty of the tutor to have lent out the L. 3022 : 10 : 7 upon sufficient security, at the commencement of his office, or at least, when he first apprehended a decline in his circumstances ; *Voet, lib. 26. t. 7. § 8. ; l. 9. § 1. ff. de adminis et peric. tutor, &c.* The cases put by the defender do not apply. If Robert Bogle had died bankrupt within a few days after accepting of the tutory, he would not probably in that short time have been guilty of mismanagement, and of consequence no claim would have lain against his cautioner. And, admitting the competency of an arrestment, at the instance of a creditor of the pupils, in the hands of their grandfather, it affords no aid to the defender’s plea. Mr Bogle was accountable to his pupils in two characters : As proper debtor in the sums, an arrestment might have been used in his hands : As tutor, it is equally clear, that his cautioner is bound to make them good.

With respect to the L. 4000, as it was not payable till Robert Bogle’s death, it cannot perhaps be said that it came under his *intromissions*. Still, however, as soon as *facultatibus. labi capit*, it was incumbent on him to have secured it to his pupils ; *l. 9. § 1. ff. de administ. et peric. tutor. Quod si in diem, &c.*

Replied : Robert Bogle was indebted to many other persons beside his pupils. He would therefore have acted most unjustly, if he had taken steps to have given them a preference for family-provisions, at the expence of onerous creditors.

Duplied :

Duplied: It cannot hurt the interest of the pupils, that their tutor contracted other debts. As he neglected to fulfil his obligation of securing their estate, it of consequence devolves upon his cautioner.

The Lord Ordinary, "in respect of the importance of the cause, in point of precedent," reported it upon informations.

Two of the Judges were for sustaining the cautioner's defence, even as to the L. 3022 : 10 : 7, payable by Robert during his own life, because he did not get possession of that sum in the character of tutor, but, on the contrary, had it in his hands long before he held that office. And the whole Bench (one Judge excepted) were clear that the cautioner was not liable for the L. 4000, as it could not be said that he had intromitted with a sum which was not payable till after his death. Nor was he blameable in not securing his pupils, when he felt his circumstances declining; as such an attempt would probably have had no other effect than to have forced all his creditors instantly to take measures to have prevented the intended preference.

But with respect to the debt payable in his own lifetime, a great majority were clear that the cautioner must be subjected; as it was undoubtedly an *intromission*, and therefore ought to have been secured by him in such a way as to have prevented any hazard of loss. It was further observed, That if the pursuer had been in possession of moveable goods belonging to his pupils, which he had allowed to perish, the cautioner would have been liable; and that the present case fell to be decided on the same principles.

The Court accordingly "repelled the defences pleaded for the defender George Bogle, *quoad* the L. 3022 : 10 : 7 Sterling of the pupils funds, for which the said Robert Bogle was debtor to them when he was appointed their tutor. But *quoad* the claim for L. 4000, which was not payable till the first term of Whitsunday or Martinmas after the death of Robert Bogle, they found that this did not fall under the cautionary obligation."

Lord Ordinary, *Eskgrove*.

A&A. Rolland, Archibald Campbell junior.

Alt. Solicitor-General Blair, Archibald Campbell.

Clerk, Menzies.

R. D.

N° XCV.

January 21. 1794.

The TRUSTEES on the sequestrated Estate of David Marshall

A G A I N S T

JAMES PROVAN and COMPANY, and others.

BANKRUPT.—COMPENSATION.—RETENTION.—*A person's purchasing goods within sixty days of the seller's bankruptcy, and afterwards getting bills granted by him to others, indorsed to himself for the purpose of compensating the price with them, found to be an illegal transaction.*

DAVID MARSHALL sold Provan and Company goods to the amount of L. 253 : 6 : 9 Sterling, for which they agreed to grant him bills payable six months after date. Provan and Company alleged that this sale happened on the 10th January 1792; while Marshall contended, that it did not take place till the 24th of that month.

In the year 1791, Hamilton and Company had sold Marshall all goods to a considerable amount, and in part payment had received two bills, accepted by Marshall, amounting together to L. 237, 13 s.

On the 21st January 1792, Hamilton and Company indorsed these two bills to Provan and Company, who, in return, granted their own bill to Hamilton and Company for their amount.

David Marshall having soon after demanded from Provan and Company bills, in terms of their agreement, for the price of the goods which he had sold them, they pleaded compensation to the extent of the bills which they had thus got indorsed to them, and offered him cash for the balance.

Marshall's estate was sequestrated upon the 3d February 1792, and on the 20th he was rendered bankrupt, in terms of the act 1696.

The trustee on his sequestrated estate brought an action, in which he called both Provan and Company, and Hamilton and Company, concluding for payment of the price of the goods furnished by Marshall to Provan and Company; and

Pleaded: It is admitted that Provan and Company got Marshall's bills indorsed to them on the 21st January. If therefore the sale of the goods by Marshall to them took place on the 24th of that month, (a fact of which proof is offered), the transaction falls directly under the act 1696; the delivery of the goods being clearly

it fell under the express words of the act 1696. The question therefore came simply to be *cui incumbit probatio*.

All the other Judges agreed with his Lordship, that if the sale took place after the date of the indorsements, the transaction fell under the act 1696; but they differed from him in thinking it valid, if the sale by Marshall took place on the 10th January. The act 1696, (it was observed,) being made to repress fraud, and as every possible device would be fallen upon to evade it, the most liberal interpretation should be given to it. The presumption of law arising from it, is, that a person foresees his bankruptcy 6 days before it occurs; and therefore all securities granted by him for prior debts, within that period, are annulled. But if the transaction in question were sustained, a person, even within a few days of insolvency, might defeat this salutary regulation, merely by informing a favourite creditor of his situation, and desiring him to assign his debt to some friend, to whom he had sold goods equal to its amount, for the price of which he would be entitled to plead compensation upon the debt thus assigned. Although, therefore, in the present case, there was no evidence of the bankrupt's being privy to the transaction between the two defenders, yet it was too dangerous, in point of precedent, to be supported. Indeed, independent of the badness of its general tendency, it is clear, from the whole circumstances attending this transaction, that the indorsement of the bills arose from an apprehension of Marshall's bankruptcy; and on that account it was an improper accommodation by Provan and Company to Hamilton and Company; especially as the former had previously entered into an agreement with Marshall, to grant him their own bills for his goods, from which they were not entitled to depart.

• The Court "adhered."

Lord Ordinary, *Henderland*. *Act. Cullen*. *Alt. Corbet*. Clerk, *Sinclair*.

R. D.

N° XCVI.

mode in their power of forcing him to relieve them from th
hardship.

Answered, 1mo, When originally the connection between superior and vassal was a matter of personal favour and attachment, no change of either could take place without mutual consent. But, when afterwards a consideration in money was substituted for personal services, and the parties came to have no further connection with each other, than in so far as their patrimonial interest was concerned, it came to be understood, that each was at liberty to act in any way which did not injure the right of the other; and the superior continued to be prohibited from interposing a third party between himself and his vassal, merely because by that means the amount of the feudal casualties might be increased. This prohibition, however, strikes only against irredeemable dispositions, and not against rights in security; because the granter of the latter continues to be superior, and alone entitled to all the feudal casualties. The creditor, on the other hand, acquires only a right of pledge, of which a simple discharge, without new investiture on the part of the superior, is sufficient to divest him. Ersk. b. 2. tit. 8. § 31. tit. 12. § 46. Baillie b. 2. tit. 5. § 1. Stair, b. 2. tit. 10. § 1. Forbes, 5th July 1772. Bennet against Drummond. Even a public investiture would not give the creditor any higher right. There can be no doubt, that the vassal may grant such securities, and there is no reason why the same right should be denied to the superior.

2do, The right of the creditor being once legally constituted, after deed of the debtor, or of his heir, nor consequently the circumstance of the latter neglecting to enter, can affect it. Besides, in the character of apparenancy, even the heir himself is entitled to draw feu-duties from vassals, in the same manner as rents from tenants.

When the immediate superior refuses to enter, his vassals may get themselves entered, without any additional expence, by having recourse to the next superior, or to the Crown; 1474, c. 58. And, when a declarator of the tinsel of the superiority is obtained, the superior passed over loses his right to the non-entry duties, but is still entitled to the feu-duty, and other casualties. Mackenzie's Observations on act 1681, c. 21. Wight on Elections, p. 205., 1780, Earl of Fife and Sir James Duff against Sir John Sinclair.

Replied: The right of vassals to a renewal of their investiture is coeval with the feudal contract, and antecedent to the right of any creditor.

There is a material difference between the permanent right of a feuer and the temporary one of a tenant; and, if the latter had any claim against his landlord, which an apparent heir could not grant, he would not be entitled to demand rent from him. Besides all the expence and trouble incurred by vassals in charging a higher superior, he would not be obliged to enter them until all the arrears due by the immediate superior were paid.

The Doctor, nevertheless, having brought a process of a tation, the Earl, in bar of it, founded on the missive.

The Court, considering the transaction as a *pactum illicitum*, repelled the objection.

The Earl, in a reclaiming petition,

Pleaded: A minister is the unlimited proprietor of his benefice. He may assign it either gratuitously or for an onerous consideration, caring his life, although he should thereby render himself incapable of supporting his rank. As therefore an assignation from the pursuer, conveying to the Earl his whole stipend, on receiving L. 300, would have been binding on him, *a fortiori* must the assignation in question, which only precludes him from augmenting it.

The interest of the benefice is not hurt by the bargain. On the contrary, by means of it the heritors will not have it in their power to plead a recent augmentation against the next incumbent, who from the progressive improvement of the country, is entitled to a larger stipend than the present pursuer could expect.

The Lords refused the petition without answers.

For the Petitioner, *Dean of Faculty Erskine.*

N^O XCVIII.

January 23.

JAMES BARRON,

AGAINST

SARAH ROSE.

LOCUS POENITENTIAE.—*A bargain concerning heritages, entered into by missives, found not to be binding, where one of the missives was defective.*

JAMES BARRON conveyed his right in certain houses to **Rose**, by the following holograph missive:

“MADAM, *Fort-George, 24th November 1793*

“I promise to give you possession of all the houses belonging to me in Campbelltown, at Whitsunday 1793, according to the agreement of this date.”

Mrs Rose, on the other hand, granted another missive, on the same date, to Barron, obliging herself to pay the price

term of her entry; it was, however, neither holograph nor attested by witnesses.

James Barron afterwards brought an action, concluding against her to fulfil the bargain.

In defence, she urged, that as her own missive was not holograph, she was entitled to depart from it; 26th February 1761, Fulton against Johnstone.

The Lord Ordinary found, "That the counter missive by the defender not being holograph, or otherwise probative, the bargain, which related to an heritable subject, was incomplete, and the defender at liberty to refile, and therefore assilzied her."

In a reclaiming petition the pursuer

Pleaded: It is no doubt a settled point, that in bargains respecting heritage, there is *locus penitentiae* till they are completed by a formal writing. But, as the defender's missive related merely to the price, and had no reference to the conveyance of heritage, it was not necessary that it should be holograph; on the contrary, a verbal obligation proved by her oath, would of itself have been sufficient. The delivery and acceptance of the regular missive, obliging the pursuer to convey the subject, completed the transaction, and barred *locus penitentiae*; Stair, b. 1. tit. 10. § 9; Lem. Decis. 23d November 1748, Lord Kilkerran against Pater-son; Dict. vol. 3. p. 221.; 10th August 1759, Muirhead against Chalmers.

Observed on the Bench: A bargain concerning heritage may indeed be completed by an unilateral obligation. But the present is not a case of that kind. It is a mutual contract, entered into by missives, which must be binding on both or neither of the contracting parties. This is the rule in all bargains concerning heritage, as has been solemnly decided; 29th November 1764, Fulton against Johnstone; 22d May 1790, Macfarlane against Grieve, &c. Lord Kames thought otherwise, which led him in reporting some of those cases, to give them a different turn. That of Lord Kilkerran against Pater-son, 23d November 1748, proceeded entirely upon specialties, though it has erroneously been supposed to be a decision upon the general point of law.

The Court refused the petition without answers.

Lord Ordinary, Polkemmet. For the Petitioner, M. Rofs. Clerk, Gordon.

R. D.

Nº XCIX.

N° XCIX.

January 25. 1794

ROBERT MACKAY,

AGAINST

His CREDITORS.

CESSIO BONORUM.—ALIMENT.—*The pursuer of a Cessio bonorum allowed to retain a small annuity for his aliment, although the donor had not declared it alimentary.*

ROBERT MACKAY, a shopkeeper, having become bankrupt, brought a process of *Cessio bonorum*.

His chief property consisted in a reversionary interest in the estate of an uncle, which depended upon his surviving certain other persons, and in an annuity which the uncle had left him, under the management of trustees, with power, if they should think it for his interest, (of which they were to be the sole judges), to advance either the whole or a part of the capital. The annuity had been originally L. 12, but had been reduced to L. 9, in consequence of advances made to him by the trustees.

The creditors contended, that if the trustees should refuse, and the Court should not think proper to compel them to advance the remainder of the capital, the pursuer should be obliged to assign to them the annuity, as the donor had not declared it to be alimentary, or free from the diligence of his creditors.

The trustees having declined to advance the money, the pursuer stated, That he was one of seven nephews and nieces to whom legacies were left; but the only one to whom an annuity was given, because from the facility of his disposition his uncle did not think him capable of providing for himself; and further

Pleaded: The annuity was evidently intended for the pursuer's aliment. Besides, it is so small, that the pursuer, who was not bred to any handicraft, is entitled to retain it, as coming under the *beneficium competentiae*; 11th July 1778, Reid against Donaldson; 5th August 1788, Pringle against Neilson. If the creditors should continue to confine him, they would be obliged to give him a greater allowance; and they are evidently interested in his being at liberty and subsisted, as his reversionary interest in his uncle's estate depends upon his surviving other persons.

On advising a condescence, with a minute and answers, it was

Observed

In a suspension and reduction of this decree, as *ultra vires* of the arbiters, brought by Woddrop, he contended that they had taken into their consideration the other meliorations claimed by Finlay, besides the manure, for which alone he was entitled to deduction.

Finlay, on the other hand, asserted, that the arbiters meant only to give him an allowance for the meliorations occasioned by the manure; and craved that they might be examined, in order to ascertain this fact.

The Lord Ordinary, before answer, ordained the arbiters to declare, by a writing under their hands, which of the two meanings they had in view, in using the expression in question.

In a reclaiming petition, the suspender

Pleaded: A submission is an agreement to act as the persons therein named shall direct. The decree pronounced by them is equally binding on the parties, as a mutual contract framed by themselves; and if the arbiters do not exceed their powers, it is equally free from objection or review.

The decree of an arbiter, like the final sentence of a Judge, admits of no extrinsic explanation; Bankton, vol. i. p. 457. § 22. It is the subject of construction, not of evidence. It is acknowledged that an arbiter cannot alter or amend his decree, and there is the same reason against allowing him to explain it. For not only is there no accurate distinction between ambiguity and error, but there are infinite degrees of both; and what appears clear to one person, may appear ambiguous to another; so that, if an explanation can be admitted in one case, it must be so in every one where any objection can be started: And danger will result, not only from want of recollection in arbiters, but from their corruption, and particularly where their decree is challenged as *ultra vires*, from the temptation of giving it that explanation which they find is necessary to support it.

Besides, the power of arbiters is at an end whenever their decree is pronounced; and if it is afterwards to be affected by extrinsic evidence, there seems no reason why they alone should be examined, or why a proof at large should not be allowed.

It is true the proof granted in the present case is *before answer*; but although a Judge will not determine the *relevancy* of the random allegations of parties, but will require their averments to be established by evidence before giving a judgment, wherever the *competency* of the mode of probation is disputed, that point must be decided before the parties are put to the expence of a proof; 22d June 1763, Norvel against Ramsay; 11th March 1786, Macdonald against Callender; 26th February 1787, Wilson and Corse against Kay.

Answered: Although an arbiter cannot carry his judgments into execution, like an ordinary Judge, he has the same powers with him,

The Lords almost unanimously found, "That in this case
"not competent to examine the arbiters;" and remitted to
Lord Ordinary to proceed accordingly *.

Lord Ordinary, *Craig*.
John Millar junior.

For the Suspenders, *Dean of Faculty Erskine*,
Alt. *Fletcher*. Clerk, *Sinclair*.

D.

N° CI.

February 5. 1795

Dr ROBERT MOIR,

AGAINST

Dr CHARLES ALEXANDER GRAHAM, and others.

P O I N T I.

TAILZIE.—CLAUSE.—PRESUMPTION.—*A clause in an entail, prohibiting the heirs called to the succession from raising the rents beyond a certain amount, found to be revoked, by the entailor's increase of them in his own lifetime above the sum specified.*

GEORGE MOIR, in 1787, executed an entail of the estate of Leckie, with strict irritant, and resolute clauses. Among others it contained the following condition: "Nor shall it be the power of the heirs-male of my body, or others, heirs of said, substituted to them, to increase the rental above L. 1000 Sterling *per annum*, including kail and casualties, so as the rental may be always well and regularly paid; but without prejudice to the heir in possession, to take grassums for any lease he may grant, not exceeding 19 years, of any part of said lands."

The rental of the estate, at the date of the entail, was L. 1000 Sterling; and when the leases expired, Mr Moir augmented the rental without any regard to this clause.

In 1791, he executed a deed, where, after making some alterations, but none on this clause, "he approves of the foresaid deed of entail, in all the other articles and clauses thereof."

At the time, however, when he executed this last deed, the rental of the estate exceeded L. 1000. And at his death, in 1795, it amounted to L. 1123, 6 s. without including any rent for the acres in his natural possession.

* Besides arguing the general point, parties had recourse to the special circumstances of the case; but the Court went upon general grounds.

Dr Robert Moir succeeded him, under the entail, and brought an action against the substitutes, concluding, that the said George Moir having increased the rental above the sum of L. 1000, had thereby revoked the above-cited clause; and that, therefore, the pursuer should be at liberty to keep up and augment the rent of the entailed estate, as freely as if it had not been inserted. In support of this conclusion, he

Pleaded: As the clause in question has been so far infringed by the entailer himself, that it cannot be complied with *in terminis*, it must be wholly at an end. It does not prohibit the entailer from maintaining the rental as he found it; and it would not be the prohibition in the entail, but a new and a different one, which would restrain the heir in possession from increasing it still farther, at the expiration of the current leases.

Answered: The deed of alteration executed by Mr Moir, revoking certain clauses of his entail, and approving of all the others, at a period when he had raised his rental to above L. 1000, precludes any presumption that he meant to recal the condition in question. Indeed, supposing he had not made such a deed, there would have been no room for that presumption. By taking a higher rent himself, he exercised the right of an unlimited proprietor, but did nothing which was inconsistent with his intention of circumscribing the powers of his successors. The surplus rent, which he himself stipulated, may no doubt be levied by the pursuer; but were he to renew the current leases, without confining the rent of the whole estate to L. 1000, as he would then, by a voluntary act of his own, be violating the terms of the entail, he would be guilty of an act of contravention.

The Lord Ordinary reported the cause on memorials.

After a good deal of reasoning, the Court came to be of opinion, That the clause was to be held as discharged by the entailer, *rebus ipsis et factis*. Some of the Judges at first doubted, whether succeeding heirs could raise the rental above the sum it amounted to at George Moir's death; but it was observed, That even if this had clearly been his intention, yet, as limitations on property were unfavourable, and as the clause did not contain that precise prohibition, it ought not to be inferred by implication. The entail contained no clause, obliging the heirs in succession to diminish the rental; and no heir in expectancy could have an interest to insist on his doing so.

“ It was accordingly found unanimously, “ That the tailzier
 “ having in his own lifetime raised his rent beyond L. 1000 Ster-
 “ ling yearly, the clause restraining the heirs of entail from in-
 “ creasing the rent of the tailzied estate beyond that extent, was
 “ thereby virtually revoked by the tailzier himself, and is now
 at an end.”

POINT II.

PERSONAL and TRANSMISSIBLE.—*Effect of the entailer's appointment of the succeeding heirs to carry the arms of his family, where none are matriculated in the Lyon-Office.*

THE entail likewise contained the following clause: "And that the heirs of tailzie foresaid, succeeding in virtue hereof, shall be bound to use the name and title of Moir of Leckie, and that alone, exclusive of every other name and title; and to carry the arms of Moir of Leckie, without any addition, diminution, or alteration of any kind."

After the action came into Court, it was discovered that there were no arms of Moir of Leckie matriculated in the Lyon-Office. The pursuer being the heir, *alioqui successurus*, only in one-fourth of the estate, as representative of one of four heirs-portioners, it was likewise doubted, even if there had been such arms, whether they were assignable to heirs of entail, or whether they necessarily descended, *jure sanguinis*, to Mr Moir's heir of line.

The following conclusion was therefore added to the summons: "That the said pursuer, and the heirs of entail foresaid, are under no restraint, with regard to the carrying of any particular arms, as the arms of Moirs of Leckie, and are exposed to no challenge for disregarding the clause in the entail; or, at least, that the pursuer, and each succeeding heir, shall be at liberty to obtain arms from the Lyon-Office, and, whatever they may be, to wear and use them as the arms of the Moirs of Leckie and if used, without addition, diminution, or alteration of any kind, by the pursuer and the said heirs, that this shall be held sufficient implement of the provision relating to the arms in the entail."

The defender contended, That it was a lawful condition in tailzie to a stranger, that he should bear the granter's arms; and quoted Sir George Mackenzie's Essay on Heraldry, p. 70. as supporting this opinion.

On the other hand, it was stated for the pursuer, That he wished as far as possible, to comply with the entailer's intention; but that he was advised, that even where there were arms in a family they could not descend to a tailzied succession, without certain distinctions. And he quoted the case put in *l. 27. ff. De condit. demonstrat. (lib. 35. tit. 1.)* as analogous to the present; and suggesting, that the condition in question should be so modified by the Court, as to make it consistent with the law of the land.

The Lords "found it incumbent on the pursuer, and the other heirs of entail, to follow out the tailzier's appointment, in carrying the arms of the family."

whole property exceeded the valuation stated in the cefs-boo for the different parts of it by L. 66 Scots; and farther, in poi of law, he

Pleaded: Even admitting that at a distant period a certain degree of irregularity in the payment of the public burdens to place, all claim on that account must, *post tantum temporis*, presumed to have been derelinquished, or settled in some way or other now forgotten. A charter and seisin 40 years back would have precluded the pursuer from claiming the property of the lands. He is now demanding a certain payment of them, and cannot be in a better situation.

It is true, that every piece of land is liable to the public in its proportion of the public burdens; but, even in a question with the Commissioners of Supply, it would be incumbent on them, in order to subject the defender, to shew, not only that there was a deficiency in the *cumulo* valuation of the county, but also to point out certain lands for which no assessments were paid; and that they cannot do with regard to the defender's lands, after he has been assessed for 40 years, according to a *cumulo* valuation for the whole lands possessed by him.

Answered: When a proprietor sells a part of his estate, the part sold and the part retained are each liable to public burdens, in proportion to their value, though, till a disjunction of the valuation takes place in the cefs-books, they continue to be levied *pro indiviso* from the whole lands. No agreement of the parties can affect the right of the public in this respect. In the present case, however, the purchaser is expressly bound to pay the public burdens. And no length of time can prevent the pursuer from insisting on his doing so. For, although all claim arising from bond or other obligation, of which payment or performance can be exacted at once, may be lost by the negative prescription, it is a settled point, that wherever the obligation consists solely in certain annual prestations, as in the present case, each annual payment runs a separate prescription, but the right of exaction in future cannot be lost, *non utendo*; Ersk. b. 3. tit. § 13.

The Lord Ordinary sustained the plea of the negative prescription, both against the claim for bygone payments, and for relief in future.

On advising a reclaiming petition, and answers, it was

Observed on the Bench: Even though there had been no relation to that purpose, the lands sold must have borne their

portion of the public burdens, and the claim of relief cannot be
on by the negative prescription.

The Lords unanimously altered the interlocutor of the Lord
Ordinary, and repelled the plea of prescription.

Lord Ordinary, Swinton. A&C. Dean of Faculty Erskine. Alt. Cba. Hay.
Clerk, Pringle,

D. D.

N^o CIII.

February 14. 1794.

JOHN MELVILL,

AGAINST

The CREDITORS of George Smiton.

SASINE.—*An infeftment taken in favour of the heirs of a person deceased, without naming or designing them, is ineffectual.*

LADY DIANA MIDDLETON conveyed her estate to trustees, by a deed, which directed them to settle, upon good real, or personal security, one half of the residue, after the other purposes of the trust were accomplished, for behoof of Lady Gordon, “in liferent, for her liferent-use allenary, during all the days of her life, and to her son George Gordon, and her daughter Diana Gordon, equally, and their heirs or assignees, in fee.”

George Gordon survived Lady Diana Middleton. After his death the trustees lent L. 1000, part of the residue of the trust-fund, to George Smiton, upon an heritable bond in favour of Lady Gordon, “in liferent, for her liferent-use allenary, during all the days of her life, and to her said daughter Diana Gordon, and the heirs of her said deceased son George Gordon, equally, and their heirs and assignees, in fee.” The precept of feisin contained in the bond, and the infeftment taken on it, were precisely in the same terms.

Some time after, Major Melvill lent a thousand pounds, upon receiving a conveyance to this security from Lady Gordon, Diana, her daughter, and from the surviving brothers and sisters of George Gordon, as his heirs or executors, but who had in neither capacity made up titles to him.

Major Melvill took infeftment on this conveyance.

In the ranking of Smiton’s creditors, the common agent, besides objecting to the conveyance in favour of Major Melvill, in

so far as it flowed from the heirs of George Gordon, that they had not made up titles to him, and therefore were not entitled to grant it, contended, that the infeftment on the heritable bond itself was ineffectual, as to George's share; because his heirs ought either to have made up titles to him before the security was granted, in which case the infeftment ought to have been taken in their favour *nominatim*, or the fee should have been vested in trustees for their behoof. In support of this objection, he

Pleaded: It is essential to every feudal right, that it should name the vassal in whose favour it is created; Kilk. v. Safine, 7th November 1740, Blackwood against the Earl of Sutherland, and the Representatives of Colvil and Ruffel. It is impossible for the bailie, according to the words of style, to give actual, real and corporal possession to a person who is not named, and who is unknown to him, or for the notary in such circumstances to declare, that he is well assured of the attorney's powers to receive it.

Farther, such right could neither be exercised nor transmitted. The vassal could not execute a poinding of the ground, nor grant a renunciation, and as little could any action be carried on against him. At his death the superior could not discover from the last infeftment in whose favour it had been granted; nor could the heir be served, unless in the character of *heir to the heirs* of the deceased, which is absurd. When a subject is disposed to a person and his heirs, and he dies without taking infeftment, his heir must expedite a general service before executing either the procuratory or precept, which, however, would be unnecessary if the present infeftment was effectual. Indeed, the supporting of such infeftments would go far to supersede the necessity of services altogether. For, if infeftment may be given to the immediate heirs in this manner, it may be given to heirs *in infinitum*. See also act 1693, c. 35.

Besides, it is necessary that the nature and extent of a feudal right should appear upon the records. But a purchaser, or creditor of the vassal could neither discover from them, the person vested with the feudal right, which had been executed in that manner, nor the number of persons among whom it was divided.

Answered: It is true, that in every infeftment there must be some person in whose favour the feudal right is created, and such in the present case was the heir of George Gordon.

As the sum in the bond vested directly in the heir of George Gordon, as creditor or disponee, he had no occasion to establish his right by a service; and, if a service were necessary, it could still be obtained. The objection then comes merely to this, that the name of George's heir was not inserted; but the law nowhere declares such omission a nullity. The sole object of inserting it is to point out the person meant; and this may frequently be done as well by a description as by its insertion. He may be described, for example, as the eldest son of a marriage, or the person

be held as fiduciary fiar in George's half, and the security on that account effectual; but, when it was advised with answers, these doubts were given up; and the Court approving of the *ratio decidendi* expressed in the interlocutor of the Lord Ordinary, unanimously "sustained the interest of the petitioner to the amount of the whole liferent; and, with this addition, adhered to the interlocutor reclaimed against."

Lord Ordinary, *Justice-Clerk.*

For Major Melvill, *Solicitor-General Blair.*

Alt. Rolland.

Clerk, *Pringle.*

N^o CIV.

February 14. 1794.

WILLIAM and PETER ROUGHEADS,

AGAINST

MARION RANNIE, and others.

IMPLIED CONDITION.—PROVISION TO HEIRS AND CHILDREN.

A father having granted a provision to his son, and declared, that in case of his dying in minority, and without lawful children, he should be succeeded by his sisters, "or such of them as should then be in life;" and the son having died in minority, and unmarried, his nephew, by a sister predeceased, was found entitled to his mother's share.

WILLIAM CRAIG, by a holograph settlement, containing several ambiguous and contradictory clauses, and proceeding upon the narrative of love and affection to his wife and children, conveyed to them *nominatim*, and in the different proportions therein mentioned, his whole heritable and moveable property.

The deed declared, That Marion Rannie, his wife, should have the liferent of part of the subjects; that the provision of Archibald his son should descend to his heirs, executors and assignees; and besides the provisions which the daughters (who were five in number) were to enjoy immediately upon their father's death, it contained, in a subsequent clause, the following substitution in their favour: "To my said five daughters, or such of them as shall be in life, my whole heritage and moveables, at the decease of my said wife and son, and longest liver of them two, if my said son die in minority, and without lawful children."

The children, at the date of the settlement, were all minors, and unmarried.

Archibald died in minority, and without issue.

Jean, one of the daughters, who was married after her father's death, died before her brother.

William Roughead, her son, and his father, as his administrator in law, brought an action against the grandmother and surviving aunts, claiming, *inter alia*, the share of Archibald's succession, which his mother would have been entitled to had she survived him; and

Pleaded: If it had not been for the clause of substitution in favour of the daughters, the pursuer would have been entitled, *jure representationis*, to a share of his uncle's heritable succession; and there is no reason to presume that its object was to exclude their children.

Besides, it is a general maxim of law, that when a father grants provisions to his children, without mentioning their heirs, and appoints substitutes to them, the substitution takes place only *si instituti sine liberis decesserint*. The object of such provisions, is to enable the children to settle in the world; and as it would be contrary to the natural feelings of a father, the law, unless it is expressly declared, will not presume an intention on his part to exclude their descendants; Erskine, b. 3. tit. 8. § 46.; Kilk. Clerk Home, 21st November 1738, Magistrates of Montrose against Robertson; Dict. v. Implied Condition, vol. i. p. 430.; 20th December 1758, Yule against Yule; 26th June 1789, Wood against Aitchison.

Answered: It seems to have been the intention of the testator, that his son should, at his majority or marriage, have the free disposal of his property; but that, if he died before either of these events took place, such of his daughters as were then in life, to the exclusion of the descendants of those who had predeceased, should succeed to him.

At any rate, as the deed limits the substitution to such of the daughters as should be alive at their brother's death, effect must be given to it, even though there were reason to believe that this was not the intention of the testator; Judgment of the House of Peers, 26th March 1770, Baillie against Tenant; July 1778, Hay against Hay*.

The Lord Ordinary sustained the defences; but the Court, after advising a reclaiming petition and answers, upon the general ground above stated, almost unanimously gave judgment in favour of the pursuers.

Lord Ordinary, *Henderland*.
Clerk, *Sinclair*.

Aft. *Charles Brown*.

Alt. *Wolfe Murray*.

D. D.

* Not collected.

3 N

N° CV.

N° CV.

February 18. 1794.

ALEXANDER GOVAN,

AGAINST

THOMAS LANG.

PLANTING and INCLOSING.—Act 1686, c. 11. “For winter-herding.”—*The statute applies where damage is done to corns, as well as where it is done to grass or planting.*

Can the penalties be exacted, where the cattle trespassing are berded?

Is it necessary to detain the cattle trespassing, in order to entitle to the penalties?

ALEXANDER GOVAN and Thomas Lang were tenants, each for one year, of two adjoining inclosures, which belonged to different proprietors, and which were separated from each other by a hedge and ditch, forming a fence sufficient at least to keep in horses or black cattle.

Govan had his inclosure under tillage; Lang kept sheep in the other, and possessed by him.

Govan brought an action before the Sheriff, against Lang, concluding for damages and penalties, in terms of the act 1686, c. 11, on account of certain trespasses said to have been committed by the defender's sheep upon the pursuer's corns. The sum demanded in name of penalties exceeded L. 13 Sterling; and that for actual damages, amounted to about four guineas.

The Sheriff allowed a proof; from which it appeared, that during the time libelled, the defender kept two herds, who relieved each other in succession, the one herding during the day, and the other during the night; and that in general, though it was sometimes otherwise, the one did not leave the field till the other arrived.

The Sheriff found the defender liable in payment of the actual damage done to the corns; but, “in respect he appeared to have kept a herd, found him not liable to the penalties.”

The defender acquiesced in this interlocutor; but the pursuer presented a bill of advocacy against it, in so far as it refused him the penalties of the statute. The bill being passed, the defender

Pleaded

of the latter, the person injured has the same alternative with regard to the former.

It never could be meant that no penalties could be exacted, wherever either the cattle got off the ground before they could be caught, or where the person suffering the injury had no proper place to put them into; in which last case, if he did detain them, he would be liable to the penalty of a spuilzie; Stair, 10th February 1676, Kidd.

The Lord Ordinary having reported the cause on informations, the Court were divided in opinion with regard to it.

Several Judges, upon the grounds stated for the pursuer, thought all the defences ill founded. And of those who thought the penalties could not be exacted, some gave as the sole ground of their opinion, that in this case the defender had, *bona fide*, kept herds, and had done every thing in his power to prevent the trespasses from being committed; others, that the act applied only where the cattle were detained.

The Lords, by a narrow majority, 20th November 1793, repelled the reasons of advocacy; and, upon advising a reclaiming petition and answers, "adhered."

Lord Reporter, Stonefield. Aft. Tait. Alt. Cullen. Clerk, Sinclair.

D. D.

N° CVI.

February 18. 1794.

GEORGE ROBSON,

AGAINST

JAMES ROBSON.

SUCCESSION.—*A general disponent, not the heir at law, has right to the after acquisitions of the disponent, though the rights to them have been taken in favour of heirs and assignees.*

GEORGE ROBSON disposed to George his second son, under burden of provisions to his wife, his eldest son, and other children, the whole property, heritable and moveable, "that should belong to him at his death;" reserving a power to alter, &c. He afterwards bought an acre of land, and took the rights to himself.

The Lords unanimously found, that the money could not be paid without security.

Lord Ordinary, *Metuen*. For the Suspenders, *Ja. Gordon*. Alt. *Ja. Fergusson Jun.*
Clerk, *Menzies*.

D. D.

N° CIX.

February 25. 1794.

The YOUNGER CHILDREN of Neil Macneil,

AGAINST

The REPRESENTATIVES of Sir Archibald Campbell, and Others.

REDEMPTION.—*A reverser about to redeem a wadset, must premonish those who hold subaltern infeftments granted by the wadsetter.*

THE proprietor of the lands of Ardmeanish, in 1748, disposed them in wadset to Neil Macneil, redeemable on payment of L. 410 Sterling.

The wadsetter afterwards granted heritable bonds of provision to his younger children over the wadset-lands, in which they were infeft.

The right of reversion having come by purchase into the hand of the late Sir Archibald Campbell, he, in 1779, used an order of redemption against John Cowan, then in the right of the wadset who renounced it on receiving the wadset-sum, and granted absolute warrandice to the reverser.

In 1785, the younger children of Neil Macneil, who had not been called by Sir Archibald when he used the order of redemption, brought an action of poinding of the ground. On the other hand, Sir Archibald, (who died during the dependence), and the general disponee of John Cowan, brought a counter action of reduction-improbation, for setting aside their bonds, in which they contended, in point of fact, that they had been long ago paid by the heir of Neil Macneil; and, in point of law, they

Pleaded: In consequence of the redemption of the wadset, the bonds, even although they had not been paid, no longer remain a burden on the lands. The spirit of our law is to facilitate the redemption of wadsets. See 1469, c. 27. and 1555, c. 37. Accordingly, the reverser is not bound to use an order of redemption against any but those in the actual right and possession of them

them; Stair, b. 2. tit. 10. § 19. ; Stair, 27th July 1665, Hamilton. And this order, when followed out by a declarator or renunciation, effects a complete extinction of the wadset-right, and of course of all subaltern infeftments granted by the wadsetter. The latter will, indeed, be liable in redress to the persons who hold them. But they derive no right from the reverser, who, by acting in this manner, merely exercises the faculty of disincumbering his estate, according to the forms which the law has prescribed.

Answered : A reverser about to redeem a wadset is bound to search the records, and, if he finds that it is affected with incumbrances, he should retain the redemption-money till the wadsetter produce discharges of them; or, if this is not done, he should disburthen the wadset himself, and only pay the balance to the wadsetter. If the reverser were not obliged to follow this method, it would be in vain for creditors of the wadsetter to take infeftment, or to record their seifins, as their rights might at any time be annihilated, without their concurrence.

The authorities quoted in support of the opposite opinion refer to a period of our law when base infeftments had not complete effect, unless when followed by actual possession. But the act 1693, c. 13. put base and public rights on the same footing. See Fount. 17th December 1702, Ogilvie against Stormonts.

Observed on the Bench : The wadsetter may grant subaltern rights, and therefore the reverser ought to notify to the holders of them his intention of redeeming the wadset.

The Lord Ordinary had found, “ that the deceased Neil Macneil, who had a proper wadset of the lands in question, had full power to burden the said lands to the amount of the principal wadset-sum.”

On advising a reclaiming petition, with answers, the Court unanimously approved of the interlocutor of the Lord Ordinary, on the point of law; but remitted to his Lordship, to enquire further into the fact, whether the bonds had been already paid.

Lord Ordinary, Swinton.
Clerk, Menzies.

Act. Arch. Campbell jun.

Alt. Macnabie.

R. D.

N° CX.

February 26. 1794.

FRANGIS FRASER,

AGAINST

DAVID MIDDLETON.

COMPETITION.—TITLE TO PURSUE.—1695, c. 24.—*In a competition between a lease, and a disposition followed by infeftment, both flowing from an heir apparent, neither party can object to the title of their common author.*

LIFERENTER.—*A father, after disponing his estate to his son, in his contract of marriage, reserving to himself a liferent of one half of it, has no power to grant leases of the part liferented, to last beyond his own lifetime.*

THE late Mr Frazer of Findrack, in his son Francis's contract of marriage, disponed to him and the children of the marriage, the estate of Findrack, which he had long possessed in apparen- cy, reserving to himself the possession and liferent-use of one half of it, and a power of burdening it with certain provisions to his widow and other children. The son, on the other hand, became bound to relieve him of a certain proportion of his debts; and his bride assigned her tocher of 7000 merks to her future husband. Francis, in 1772, took infeftment upon the precept in the contract.

His father, in 1785, granted a lease, for 57 years, of the farm on which he resided, part of which was in his natural possession, to David Middleton. The money-rent stipulated was 200 merks Scots, during the lifetime of the granter, and L. 100 Scots after his death. The granter also reserved to himself the liferent-use of the house in which he lived, with the offices belonging to it, and some ground adjoining. Middleton immediately entered into possession of the rest of the farm.

Upon the death of the father, in 1791, Francis Frazer brought a reduction of this lease, as *ultra vires* of the granter, and *in fraudem* of the contract.

The defender refused to satisfy the production; contending, that the pursuer's disposition and infeftment, flowing from an heir apparent, did not give him a title to pursue in the action: But the Court (7th March 1793) "sustained the pursuer's title, as sufficient, *in hoc statu*, to force production of the deeds under reduction."

The reasons of reduction came then to be discussed, when the defender

Pleaded.

tained from a person, who, before its date, had divested him of the power of granting it.

2do, It may be true, that a person cannot by any deed, *intra miliam*, retain the fee in his own person, and yet prevent his orous deeds from affecting it; but he may divest himself of fee altogether. Contracts like the present are very common, they are strictly onerous, as upon the faith of them the marriage is contracted.

Replied: When a person does not represent his author, he cannot challenge the existence of any powers in him which are not necessary to support his own right. To support the lease in question, it is sufficient that the granter was three years in possession.

The Lord Ordinary “ found, That as both the pursuer and defender derive their right from the same common author, it is not competent for the defender to object the want of title in the person of the common author, by way of defence against the pursuer; and in respect that the common author was divested of his right to the fee of the estate by the disposition contained in the pursuer’s contract of marriage, and inheritance had followed in the pursuer’s person long before the date of the lease under reduction, found, that the same cannot be effectual against the pursuer after the death of the granter thereof; therefore reduced, decerned and declared, in terms of the law.”

At advising a reclaiming petition and answers, it was

Observed on the Bench: The act 1695 does not apply to the case. The pursuer has not made up titles to the estate passing from his father, and he has no occasion to do so, as he has already a title good against every person who does not shew a preferable right to that of his father. As both parties found upon the right of their common author, both must hold it to be complete. The pursuer has the preferable right from him. If the tack had been derived from old Fraser, it would have been incumbent on the pursuer to have produced a complete progress, but in the present circumstances the production of his seisin is sufficient.

The Lords, by a great majority, “ adhered.”

Lord Ordinary, *Justice-Clerk*.
Clerk, *Home*.

Ald. *Gba. Hay*.

Alt. *Maçonochie, Hutchison*

N^o CXI.

March 1. 1794.

JAMES HALLOWS, Petitioner.

SUMMARY APPLICATION.—*A summary petition by a tutor, for authority to let an heritable subject belonging to his pupil for a period longer than the duration of his office, found to be incompetent.*

UPON the death of Henry Hallows, cotton-manufacturer, James his brother was served tutor-in-law to his children; the eldest son, who succeeded to the heritable property, was ten years of age. James presented a petition, stating, That the chief property of his nephew consisted of a cotton-mill, the operations of which it had in the mean time been judged expedient to stop: That he was unwilling to apply for authority to sell it, because if it were sold his pupil would be deprived of a favourable opportunity of prosecuting the trade of his father, if he should afterwards be so disposed: That on this account it was proper the subject should be let; but as no person would take a lease of a cotton-mill for so short a period as four years, to which only his office and power of granting leases extended, he prayed for a warrant from the Court to grant a lease of it for 14, or such shorter number of years as should be judged expedient.

The Lords unanimously refused the petition as incompetent.

For the Petitioner, *D. Douglas.*

Clerk, *Pringle.*

D. D.

Not. The tutor afterwards brought a process of cognition and sale, containing a conclusion for authority to let the subject "for a term of years" beyond the pupilarity or minority of young Hallows, if it should be judged expedient, which was accordingly granted.

N^o CXII.

March 7. 1794.

JAMES CAMPBELL,

AGAINST

JOHN SCOTLAND and ALEXANDER JACK.

ADJUDICATION.—*A declarator of expiry of the legal is necessary in order to cut off the right of reversion.*

Effect of a decree of declarator.

GEORGE GIB in 1757, adjudged a tenement of houses for a debt nearly equal to their value. He entered into possession, and soon after sold the subject in different parts. No declarator of expiry of the legal was ever raised.

In 1790, James Campbell, in right of the reverser, brought reduction against John Scotland and Alexander Jack, who, about ten years before, had acquired right to a part of the subject by adjudication from the heirs of the purchasers from Gib.

The pursuer stated several objections to the original adjudication, and likewise contended, that the debts on which it proceeded were extinguished by the intromissions of the defenders and their authors.

The Lord Ordinary took the cause to report; and the Court before determining the particular objections ordered a hearing in presence, on the general question, how far, where the adjudication is liable to no objection, and the debt is not extinguished by intromissions within the legal; a decree of declarator is necessary in order to cut off the debtor's right of reversion.

The pursuer

Pleaded: The common law of Scotland gave the creditor a right to attach, and to sell irredeemably a part of his debtor's estate, sufficient to extinguish his debt. In this state of the law, as there was no good reason for giving a right of reversion, that privilege, which was introduced by 1469, c. 36. might have been considered as unfavourable. But when, in consequence of a slovenly practice, unauthorised by law, general appraisings were introduced,

duced, whereby a valuable estate might be carried away for a small debt, the expiry of the legal became highly penal against the debtor. Prior to the act 1621, c. 6. which indirectly recognised general apprisings, the Court, if any case had occurred, would probably have restricted the right of the creditor to a security, and given the debtor an unlimited right of redemption; and although afterwards they gave effect to the expiry of the legal, they canvassed apprisings so strictly, that in almost every case it was opened up. Dict. v. Apprising.

The act 1672, c. 19. which was framed by Lord Stair, was intended to put an end to the hardships attending the former practice, but it failed in its object, by allowing a general adjudication wherever the debtor refused to assign over a part of his estate, one fifth greater in value than the sum due by him. General adjudications, being equally penal to the debtor, are therefore liable to the same restrictions with general apprisings.

Now, it is a general rule, that penal irritancies introduced by law do not take effect without declarator. This holds in the case of the irritancy *ob non solutum canonem*, and in that for omitting to insert the limitations of an entail, in terms of the act 1685. For the same reason, a declarator of expiry is necessary, and particularly where the adjudger enters into possession, as the debt may have been extinguished by intromissions within the legal. By this measure the debtor is warned of his danger, and in practice a state of the adjudger's intromissions are inserted in the libel and decree of expiry, for his information. Accordingly, the mere expiry of the legal has been in no case found sufficient to deprive the debtor of his right of reversion; and, in the following cases, the Court have gone upon the supposition that a process of declarator was necessary; 5th March 1766, Chalmers against Oliphant; 7th March 1769, Caitechon against Fleeming*; 3d March 1758, Anderson.

Besides, the only plausible reason for allowing an expiry of the legal to take place at all was, that the creditor might be indemnified for being obliged to take land instead of money. This inconvenience, however, was removed by the acts 1681, c. 17. and 1690, c. 20. which allowed any one creditor of a bankrupt, either before or after the legal was expired, to bring the lands to judicial sale. Indeed, it may be doubted whether these statutes did not operate as a virtual repeal of the former ones relating to the expiry of the legal, the admission of the competency of a judicial sale after that period, shewing, that adjudgers are considered even then not as proprietors but as creditors.

Answered: It appears, not only from all the statutes relating to adjudications, (1469, c. 36.; 1661, c. 62.; 1672, c. 19.), but also from those respecting other matters, that the mere lapse of the legal, without any declaratory process, was intended to make the subject

* Not collected.

subject adjudged the absolute property of the adjudger. It was upon this account that the act 1681, c. 21. gives adjudgers, after the expiry of the legal, a right to vote at elections; although it was intended that persons vested with an absolute right of property, should alone have that privilege. For the same reason when, by 1690, c. 10. annuities arising from debts, real or personal, were subjected to certain assessments, creditors possessing upon adjudications, whereof the legal was expired, are exempted. It is upon this principle also, that the creditor is not obliged to account for his intromissions after the legal; 1621, c. 6.; Bankr. b. 3. tit. 2. §§ 65. 73.; Principles of Equity, vol. i. p. 381. Indeed, the summons of declarator itself, according to common style, states, that the lands have, ever since the expiry of the legal, belonged to the pursuer. This process is not so much as mentioned either by Stair or Mackenzie; and that it is not necessary was found; Fount. 22d February 1704, Livingston against Goodlet; July 1783, Gordon of Carnfield*; see also Ersk. b. 2. tit. 12. §§ 22. 26.; Bank. b. 3. tit. 2. § 49.; Stair, 18th June 1675, Laird of Leys against Forbes.

The act 1681, c. 17. does not apply to this case. Its object was to force the debtor to give up his land, and it leaves all questions with co-creditors to be settled in the ranking; or perhaps it may have meant to take away the right of adjudgers, in case of the insolvency of the debtor.

The Court considered separately the necessity of a decree of declarator, and its effects†. On the first point it was

Observed: The acts 1681 and 1690 do not affect the present question. Formerly the estate of a bankrupt was divided among his creditors, and they had no way of getting payment of their debts in money. The sole object of these statutes was to remedy this defect, and not otherwise to regulate the interests of debtor and creditor.

It seems to have been the idea of the Legislature, when the acts 1661 and 1672 were passed, that an expired legal should operate *ipso jure*. But for a long time back the rigour of the law has in this respect been mitigated; and even the principle of the act of federunt, 27th November 1592, with regard to conventional irritancies, has not been strictly adhered to. A more equitable practice has now succeeded, by which parties are allowed to take as little

* Not collected.

† The expence of this hearing was defrayed jointly by the parties in this action, and by those in that of Landale and Carmichael. In this last case a decree of declarator had been obtained, and the question turned on objections to the adjudication, which had been led for several distinct grounds of debt. There was an admitted *pluris petitio* on one of them; and a doubt was entertained how far that circumstance should not restrict the whole diligence to a security. The Court ordered memorials, which have been since advised; and the case will be collected among the decisions of the following year. It was owing to the circumstance of both cases being before the Court at the same time that they had occasion to deliver an opinion on the effect of a decree of declarator.

little advantage of one another as possible ; and a reasonable time has in general been indulged, for doing away the effect of penal irritancies. The general adjudication now in use, is evidently not a sale under reversion, but a mere *pignus pratorium* ; and to convert it into an absolute right of property, by the mere lapse of ten years, would be a strong and very unjust operation of the law, and not agreeable to its analogy or spirit in other instances. The creditor is not obliged, at the expiry of the term, to take the estate, *in solutum* of his debt ; and as little ought the debtor to be foreclosed without some further judicial act, if the estate be large, in proportion to the debt. In the case of Gordon of Cairnfield, the Court went upon specialties ; and it may be doubted whether it was a good decision.

As to the effect of a decree, when obtained, the Court were agreed, that where appearance was seriously made for the debtor, all objections would be discussed ; and that, if they were not sustained, and the irritancy not removed, the lands, in consequence of the decree, would become the absolute property of the creditor : But it was thought more difficult to determine what should be the effect of a decree of declarator in absence. On the one hand, it was observed by some of the Judges, that though the debtor might be restored against such a decree, upon shewing objections to the adjudication, or upon proving that the debt had been extinguished within the legal, the mere inequality between the extent of the debt and the value of the lands adjudged, ought to be no ground for setting it aside. Other Judges thought, that the effect of such a decree would depend upon the whole circumstances of the case, and that the value of the lands, compared with the extent of the debt, must be taken into the account ; and that it would be necessary in every case to enquire what time had elapsed since the expiry of the legal ; whether improvements had been made upon the faith of the right being absolute ; or whether matters were still entire ; and in general, that it would be incumbent upon the reverser to show good cause why he should still be restored against the decree of declarator, which he could not be without making full satisfaction to the other party.

The Lords almost unanimously found, “ That the expiry of the legal does not vest the estate in the adjudger *ipso jure*.”

Lord Reporter, Dregborn. Aft. Solicitor-General Blair, Geo. Fergusson,
John Buchan-Hepburn. Alt. Dean of Faculty Erskine, Cullen, Tait.
Clerk, Sir James Colquhoun.

D. D.

N^o CXIII.

March 7. 1794.

The CREDITORS of Neil Macneil,

AGAINST

JAMES SADDLER:

ADJUDICATION.—*An adjudication found to be null, which was led up on a decree for payment of the random sum of L. 10,000; although it reserved all objections contra executionem, no proof of the debt having been produced when the decree was obtained, and the sum really due having turned out to be only L. 800:10:7½ currency — the island of St Christopher's.*

WILLIAM SADDLER, merchant in the island of Nevis, in 1758, entered into partnership with Neil Macneil. Their trade was carried on in the island of St Christopher's, under the management of the latter, who, upon the dissolution of the Company in 1761, was entrusted with winding up their affairs.

In 1763, Macneil eloped from St Christopher's, carrying with him effects belonging to the Company, to a considerable amount.

Saddler, knowing that Macneil at this time had heritable bonds for L. 6722 Sterling over the estate of Taynish, in Scotland, sent a power of attorney to a man of business in Edinburgh; and, at the same time, desired him to attach these bonds for payment of the large balance which he then imagined that Macneil owed him. Having, however, no access to the Company-books, which were in Macneil's custody, he had no means of ascertaining the amount of his claim against him. His information to his agent here was consequently in very general terms: "That Macneil, after receiving every shilling he could, had eloped from this island, and carried with him L. 7000 or L. 8000, and had taken protection in the Danish island of St Croix, where he is not only protected, by that government, in his person, but his effects; by which his creditors will be defrauded of their money, amongst which I am the most considerable sufferer."

Without receiving any farther information from Saddler, his agent, executed an arrestment *jurisdictionis fundandæ causa*, and on the 24th February 1764, raised a summons of constitution against Macneil, for payment of the random sum of L. 10,000, which it was stated "would appear to be due to the pursuer, upon a just count and reckoning."

When the summons came into Court, appearance was made by the defender's attorney, who denied the libel; and stated, "That
" it

it was led for a random sum, unsupported by evidence." To which it was *answered*, That there were already adjudications led against the defender; and that therefore, in order to put the pursuer *in pari casu* with them, it was necessary that decree should be pronounced, reserving all defences *contra executionem*. Accordingly, in February 1765, a decree was obtained under this reservation.

Saddler's agent soon after raised a summons of adjudication, narrating the decree of constitution, and the reservation which it contained; and, on the 8th August 1765, he obtained a decree, adjudging Macneil's interest in the estate of Taynish, for payment of the accumulated sum of L. 10,724 Sterling.

In 1780, this adjudication was produced as an interest for James Saddler, the heir of William, in the ranking of Taynish; but as the decree of constitution had proceeded without any evidence of the debt, the Company-books, which had been recovered from Macneil, were transmitted to this country; and a remit having been afterwards made to an accountant, to ascertain the precise balance due by Macneil, he made up a report, stating it to be no more than L. 800: 10: 7 $\frac{4}{12}$ St Christopher's currency.

The other adjudgers of Macneil's bonds on the estate of Taynish, contended, that the adjudication was null *in toto*; and

Pleaded, 1st, The decree of constitution, and of consequence the adjudication, is fundamentally void, as having been obtained without any proof of the debt; Dict. vol. ii. p. 182. *voce* Proof. Neither will the reservation which it contains, of all objections *contra executionem*, support it. The only cases where such reservations have any effect, are those requiring dispatch, where the pursuer shews proof of his libel, *ex facie* legal and sufficient, and the defender states defences which cannot be instantly verified.

2dly, Supposing it had been competent for Mr Saddler to have adjudged, he mistook the proper form. As his claim was illiquid and contingent, in place of adjudging for payment on the act 1672, he ought to have led an adjudication *in security*, the legal effect of which never expires; President Falconer, No. 102.; Forbes, 22th July 1711, Blaw against his Father; Fac. Coll, 16th February 1759, Nisbet against Stirling; 14th November 1781, Brown and Collinson against the other Creditors of Sir Thomas Wallace.

3dly, The extravagant *pluris petitio* would of itself be fatal to the adjudication, even if it were otherwise unexceptionable. It is led for L. 10,724 Sterling, and it turns out that there is only L. 800: 10: 7 $\frac{4}{12}$ currency due. In adjudications upon the act 1672, as well as in the old appraisings, the debt for which the lands are adjudged is in law held to be a price commensurated to their value, for which the lands are sold under reversion; and as it does not follow, that because the debtor allows them to be adjudged, and sold for a particular sum, he would have done so, if the

sum had been less, the consequence must be, that an adjudication ought to be set aside, when the debt turns out to be less than the sum adjudged for. Accordingly, in practice, a *pluris petitio* is always fatal to the diligence, as a proper adjudication. In very favourable cases, indeed, such as where partial payments have been made without the knowledge of the creditor, or where the debt is found to be less than what was supposed, in consequence of the subsequent decision of points of law, it is sustained as a security for the debt, without the accumulations; but this is converting it into a right of a quite different nature, and may be regarded as one of the strongest exertions of the *nobile officium* of the Court. In cases like the present, however, where the *pluris petitio* is considerable, and where there is no plea of favour on the part of the creditor, the adjudication is always reduced *in toto*; Fac. Col. 16th December 1760, Creditors of Brown against Gordon; 4th February 1784, Apparent heir of Porteous against Sir James Nasmyth.

Answered, 1st, The debt for which the adjudication was led, arose not from any clear document by which its amount could be instantly verified, but from a fraudulent act on the part of Macneil, which made it impracticable for Saddler to give his attorney in this country precise information respecting the extent of the balance due to him, or to transmit any voucher for instructing it. And as other creditors of Macneil were adjudging the fund *in medio*, the year and day must necessarily have elapsed before more accurate information could have been got from the West Indies. In this situation, the adjudging for a random sum, reserving all defences *contra executionem*, was a measure justified by the necessity of the case; as otherwise, the preference given to adjudications within year and day, would often amount to an absolute exclusion of just creditors residing in foreign countries.

2dly, The adjudication in question was substantially one in security; for, as it proceeded on a decree of constitution, containing a reservation of all defences *contra executionem*, it appeared, *ex facie*, to have been obtained for a debt not yet properly liquidated. The legal, therefore, could never expire, it being thus admitted, that the sum which the debtor was to pay, in order to redeem it, was to be the subject of after discussion.

3dly, When adjudications were substituted in place of appraisings, although they still bore the form of sales under redemption, they came in reality to be considered merely as securities for debt; and hence the voiding an adjudication *in toto*, on account of a *pluris petitio*, became as unnecessary as it was rigorous. If led for more than the real debt, nothing can be more simple than to reduce it *quoad excessum*, allowing it to subsist as a security for what is justly due. Accordingly, for a long time past, the practice has been merely to restrict the adjudication to that sum, striking off penalties and accumulations; Kilkerran, p. 17. 6th November

In 1792, her husband became insolvent, and fled the country, and his estate was soon after sequestrated.

In 1793, Mrs Robb made a summary application to the Court, praying to have a suitable aliment modified to her out of the annual produce of her heritable property; and in support of this claim, she

Pleaded: 1st, If the wife before marriage has no property of her own, she must depend entirely on her husband's fortune or industry for support; but, when effects formerly belonging to her are transferred to him by the act of the law, in consequence of the marriage, as that transference is founded entirely on the presumed will of the parties, it must be an implied condition in it that he shall suitably aliment her, or rather, that she shall reserve as much to herself as is necessary to secure her in all events against absolute indigence. Accordingly, in the case Fac. Coll. 22d November 1785, Lisk against her Husband and his Creditors, the Court, proceeding on these principles, modified out of her own estate a liberal aliment to a wife whose husband had become bankrupt. See also Falc. 21st February 1745, Bontein against Bontein; Stair, b. 1. tit. 4. § 9.

2^{dly}, When a wife is obliged to leave her husband on account of maltreatment, and still more when, as in the present case, she is deserted by him, she becomes a just creditor for an aliment, in the same manner as she would for her legal provisions, upon the dissolution of the marriage by his death. On this ground, she may not only claim on his bankrupt estate, but may also retain in her own property for her security; Dict. vol. 1. p. 595. 596. and 597. and vol. 3. p. 253.; Kaims, No. 29. December 1721, Selk-rig against Selk-rig. Neither can it be maintained, that there is now no room for retention, the legal assignation at the marriage having already transferred it completely to the husband; for a legal assignation can have no stronger effect than a voluntary one; and it is a clear point, that in the case of a direct assignation by the wife to the husband in a marriage-contract, while the subject remains *in medio*, it may be retained in the event of the husband's bankruptcy, till the counter obligations in her favour are made good; Dict. vol. 3. p. 253.; C. Home, 22d June 1743, Crawford against Mitchell.

3^{dly}, The wife may be considered as fiar of her own heritable estate, and her husband, or the trustee for his creditors in her right, as the liferenter, and, according to the obligation universally understood to lie on the liferenter, where the fiar has no separate means of livelihood, the petitioner is entitled to an aliment; 1491, c. 25.; Stair, b. 2. tit. 4. § 36.; Dict. vol. 1. p. 3 *voce* Aliment, 22d February 1722, Master of Lovat against Fraser Ersk. b. 2. tit. 9. § 62.

Answered: Whether a husband get a fortune by his wife or not, he is obliged to maintain her. But, if there are no goods in communion, this obligation must necessarily cease. Now, the funds from which the petitioner here asks an aliment belong not to him,

him, but to his creditors, against whom she has no legal claim; Fount. 25th November 1709, Turnbull against her husband's creditors. Even where a wife is secured in a life-rent-annuity by express paction, it was never pretended that she had right to it *pendente matrimonio*, on the insolvency of her husband.

The petitioner's argument, if good for any thing, would establish, that creditors are in every case bound to aliment, not only the wife, but the children of their insolvent debtor, as he is under a natural obligation equally strong to maintain them. This doctrine, however, is adverse to those established principles in our law, that a man's whole funds are liable in payment of his onerous debts, and that in every case the wife must follow the fortune of her husband, unless she has a separate estate constituted by law or paction.

Besides, it is wrong in the petitioner, who in fact has such separate estate, to plead that she is destitute. Upon her giving the creditors a part of the fee of her heritable property equivalent to the value of her husband's *jus mariti*, they will instantly renounce their right over the remainder.

Observed on the Bench: The fund from which Mrs Robb claims an aliment, belongs, without any reservation, either express or implied, to the husband, *jure mariti*, and consequently to his creditors. Were the Court, therefore, to give her an aliment out of it, this would just be disposing of so much of their property, which the Court has no right to do. Even therefore if the petitioner's whole fortune had been moveable, she would have had no legal claim against them; and, as the larger part of it is heritable, her claim on their compassion is considerably weakened. By accepting of their offer of purchasing her husband's life-rent on her disposing of part of the fee, she can obtain an immediate livelihood. The case of Lisk against her husband's creditors was thought to have been erroneously decided; and an appeal was entered against it, but a compromise afterwards took place in consequence of what passed in the House of Peers, after the cause had been begun to be pleaded.

The Court, with only one dissenting voice, refused the desire of the petition.

A reclaiming petition was refused, (27th May 1794), without answers.

For the Petitioner, *M. Ross. Fletcher.*

Alt. Tait.

Clerk, *Hume.*

R. D.

N° CXV.

N° CXV.

May 14. 1794.

(TEIND-COURT.)

Sir ALEXANDER RAMSAY IRVINE,

AGAINST

The Honourable WILLIAM MAULE.

TEINDS.—*An heritor may pursue a sale of his teinds, although they have been valued more than two years before.*

When an heritor brings a sale of his teinds, already valued in victual, the grain is converted at the medium of the fair prices of the county for seven years preceding.

GEORGE DEMPSTER, in 1772, brought a process of valuation and sale of the teinds of certain lands in the county of Fife, in which the Earl of Panmure, the titular, was called as defender. The teinds were accordingly valued, but the conclusion for selling them was not at that time insisted in.

Sir Alexander Ramsay Irvine afterwards bought these lands; and, in 1792, he, with a view to purchase his teinds, wakened the former action, and called Mr Maule, the Earl of Panmure's representative, as defender, who

Pleaded, 1mo, As the teinds were valued in 1772, the pursuer is not now entitled to insist for a sale of them. By the statute 1633, c. 17. confirmed by 1633, c. 19. it is enacted, "That each heritor in the kingdom being willing to buy his owne teind from the titulars having power to sell the same, shall be obliged to buy the teinds of his own lands," &c. "and to pay the prices so said betwixt and the terme of Martinmasse in the yeare of Good 1635 yeares, where the valuation of the teinds is made and approved of before the date hereof; and where the same is not yet valued, and approved within the space of two yeares after the same be valued and approved by the Commissioners to be appointed by his Majesty and his estates, to that effect. After the expiring of which time, his Majesty and estates declare, that the said titulars shall not be compelled to sell the same, except they doe it of their own good will and consent."

In several after statutes, this limitation was extended from two to three years, (1661, c. 61. 1663, c. 28. 1672, c. 15. 1685, c. 28. and 1686, c. 22.), which shews it to have been the opinion of the Legislature, that some restriction of this sort was necessary; and that the one introduced by the act 1633, c. 17. was not meant to be temporary.

The

The act 1690, c. 30. refers to the rules prescribed by 1633, c. 19.; and as it takes no further notice of the intermediate statutes than to abolish the commissions introduced by them, the Legislature must have intended to restore the original limitation of two years.

It is true that the regulations introduced by these acts have not been attended to in practice; but as the objection has never been stated, it must be presumed to have been waved by the titular; besides, it is a very delicate matter to allow an erroneous practice to get the better of positive statute, Dict. v. Consuetude, c. 203, 204. particularly in the present case, where it seems to have been the object of the Legislature to prevent the titular from being harassed with a new litigation at a great distance of time from the date of the valuation.

2do, At any rate, the grain should be converted at the current prices of the country. Indeed the act 1633, c. 17. expressly declares, that the money-price paid for teind shall be regulated 'according to the worth and price of victual in each part of the country to the which the same is;' which is inconsistent with the Court-conversion of L. 100 Scots the chalder being adopted for the whole kingdom. The price to be paid in the present case may be ascertained, either by taking the average of the fiars of the county for some years back, or by proof.

Answered: 1mo, Although, for a century back, numberless sales of teinds have been brought many years after their valuation, this objection has never been stated; and if supported, it would be equally contrary to the interest of the country and to the uniform object of the Legislature, which has been, to give every heritor an opportunity of acquiring his own teinds. The limitation of the act 1633, c. 17. was meant to be temporary only. It was introduced from the mistaken idea, that the commission to be established by c. 19. of that year, would be able to overtake the valuation of the whole teinds of the country in the period thereby prescribed. Accordingly, it was altered by the subsequent statutes, which gave the heritor a right to purchase his teinds within three years from the date of the valuation, and at last altogether taken away by the act 1690, 1693, c. 23. and 1707, c. 9. which gave a similar right, without any limitation in point of time.

2do, In 1772, when a proof was allowed to both parties, the Earl of Panmure might have established the ordinary rate at which victual was converted; but since he did not do so, he must be presumed to have been satisfied with the ordinary conversion of L. 100 Scots, and as the term was circumduced against him, no new proof can be allowed. After a proof is led in a valuation, although the process should lie over any period short of forty years, if it be afterwards awakened, a new proof is not allowed. The same rule ought to hold in the present case. The defender is so far from being a loser by the delay, that in fact the pursuer, who was entitled to his teinds at nine years purchase, has by its means been paying him

above 10 *per cent.* for the price. At all events, the grain should be converted according to its value in 1772, and not according to that which it now bears.

On advising memorials, the Court unanimously thought, that the pursuer had still a right to purchase his teinds, but were a good deal divided in opinion as to the rate at which the grain should be converted.

The Lords “ repelled the defence stated by the defender Mr Maule, that the pursuer is not entitled to insist in a sale after the lapse of two years from the date of the decret of valuation, and found the pursuer entitled to a decret of sale of the teinds of his lands libelled, notwithstanding the decret of valuation being obtained in 1772; but found, That the victual-teind must be converted at a medium of the fair prices of the shire of Forfar, within which the lands lie, for these last seven years.”

A petition for the pursuer, reclaiming against the last branch of the interlocutor, was refused without answers.

A& Gillis.

Alt. Ar. Campbell junior.

D. D.

N° CXVI.

May 21. 1794.

GEORGE MUNRO,

AGAINST

JAMES ALEXANDER.

HERITABLE and MOVEABLE.—*Although only a small part of the debt for which an adjudication is led should be made effectual by it, and although the greater part of the debt should afterwards be recovered from personal effects of the debtor situated in a foreign country, it renders the whole debt heritable as to succession.*

JOHN ALEXANDER was creditor of William Macfarlane of Macfarlane, and of his sons, in a personal bond for L. 600.

In 1778, the Messrs Macfarlanes disposed their property in Jamaica, and the estate of Arrochar in Scotland, to trustees for behoof of their creditors.

John Alexander, and other personal creditors, afterwards led an adjudication against the estate of Arrochar, which was sold by judicial sale for L. 28,000.

The purchaser was allowed to retain L. 6000 to answer an annuity secured upon the estate. The remaining L. 22,000 were divided among the adjudging creditors, and Alexander received L. 92 : 14 : 11 as his proportion of it.

In 1787, he, along with the other creditors, granted a discharge and conveyance to the purchaser, whereby they “sell, alienate and
“dispose to him the lands and barony of Arrochar, and further,
“make over and convey to him the said decreet of adjudication,
“with the grounds of debt, and that in so far as extends to the
“said sum received by us, and as tends to the said William Ferguson (the purchaser) and his forefairs their further security of
“the said lands purchased by him, but reserving to us our interests in the reserved sum of L. 6000 remaining in the said William Ferguson’s hands, for answering Lady Colvill’s annuity,
“and we also reserve all right, title and claim of right we have
“to the estate in Jamaica.”

In 1788 John Alexander died.

The trustees having after his death recovered part of the personal effects belonging to the Macfarlanes in Jamaica, the share which would have belonged to John Alexander was claimed by James Alexander as his heir, and by George Munro as his executor.

The trustees called both in a multiple-poining, in which Munro

Pleaded: The decree of ranking having precisely ascertained, in the lifetime of the original creditor, what part of the debt was secured by the adjudication, it can render the debt heritable only to that extent, especially as John Alexander himself was in fact denuded of the security by the discharge and conveyance granted to the purchaser.

Besides, the sums *in medio* arise from personal effects, which, both at the date of the adjudication and at the death of the creditor, were situated in a foreign country; and therefore, as they were not subject to the law of Scotland, that diligence could not render them heritable.

Answered: John Alexander was not denuded of the adjudication at his death. He had only conveyed it to the purchaser to the extent of that part of the price paid by him; and when a debt is secured by adjudication, however small the subject over which it extends, the whole sum is rendered heritable, every part of it being equally a burden upon land. The *jus exigendi* of course, at John Alexander’s death, was in his heir, who consequently could have attached the whole property of his debtors, whether heritable or moveable, for his payment; and, on the same principle, he alone is now entitled to the dividends, from whatever quarter they may have been recovered.

The

The Lord Ordinary found, "That it is according to the situation of the debt as it stood at the time of the defunct's death that the question is to be determined, whether a debt due to him is heritable or moveable: And in respect the debt in question, at the time of John Alexander's death, stood secured by an adjudication upon the estate of Arrochar, found, that the debt devolved upon James Alexander, as John Alexander's heir and not upon his executor."

On advising a reclaiming petition, with answers, the Court unanimously "adhered."

Lord Ordinary, *Justice-Clerk.*
Alt. R. H. Cay.

For Munro, *Solicitor-General Blair, C. Boswell*
Gordon, Clerk.

R. D.

N° CXVII.

May 22. 1794.

WILLIAM SIMSON,

AGAINST

DAVID GRAY and JOHN WEBSTER.

TACK.—A power of subsetting is implied in a lease of land for thirty-eight years.

DAVID GRAY possessed a farm on a lease for thirty-eight years, in favour of himself, his heirs and executors. Having granted a sublease of it to David Webster, William Simson the landlord, five years afterwards, brought a process in order to set it aside, in which he disputed the tenant's right of subsetting, and

Pleaded: Formerly when leases, like feudal rights, were so strictly personal to the tenant, that he could not, in the common case, transmit them even to his heir at law without an express clause to that purpose, it might have been doubted how far, in the case of a lease for a period far exceeding the ordinary duration of human life, a power of subsetting was not implied; but as leases now descend to heirs, unless expressly excluded, and the *dilectus* supposed in the contract is confined to the family rather than to the person of the lessee, there seems no reason why the duration of the lease should have any effect on the power of transferring it. Indeed, if it were to be established as a general rule, that a right of subsetting is implied in every case where the landlord must

be carried on in the burgh; and authorising the magistrates to make bye-laws for the good of the burgh, with *consent* of the *superior*.

In 1741, Sir John Shaw, upon the narrative of the inhabitants of Greenock having, with his consent, imposed a voluntary assessment, for the public use of the burgh, on all the malt ground at the mills of Wester Greenock, granted a charter to the feuers and sub-feuers of the burgh, empowering them to elect annually nine of themselves (the bailie or bailies of the said barony being always of the number) to be administrators of the produce of the said tax, and of every future assessment consented to by the superior. The charter further provided, that the eldest bailie, and in his absence the second, should preside at all these meetings; and it concluded with a declaration, that it was granted and accepted under the express condition, that "it should be without prejudice to the right of jurisdiction competent to Sir John Shaw and his forefairs, as barons of the said town and barony of Greenock."

Such was the state of the burgh, when the act 20 Geo. II. c. 48. commonly called the jurisdiction-act, was passed.

In 1751, Sir John Shaw granted a new charter to the burgh, which, after mentioning the great increase of the town, and the necessity that its government and police should be put under proper regulations, gave power to the feuers to choose annually two bailies, a treasurer and nine counsellors, in place of the nine managers appointed to be chosen by the charter 1741; with power to them to make bye-laws, admit merchants and tradesmen to be free burgessees, and with power to the bailies to hold courts and exercise jurisdiction within the burgh. The bailie of the barony was however declared to have a cumulative jurisdiction with the bailies chosen by the feuers. The charter concluded with a precept of seisin only.

The magistrates of Greenock, upon the footing of its being a burgh of barony independent of the superior, occasionally exercised the jurisdiction reserved to such burghs by the statute 20 Geo. II. c. 48. at least there was evidence of their having done so down to the year 1758; and, after having disused it for some time, they began again about the year 1789 to exert the same privilege.

The Sheriff-clerk of Renfrewshire, finding that this diminished his emoluments, by preventing many of the law-suits arising in the burgh from coming before the Sheriff-court, brought an action of declarator, concluding to have it found, that the magistrates of Greenock had no higher jurisdiction than that of ordinary baron-bailies.

In defence it was

Pleaded, 1st, The great object of the act 20th Geo. II. c. 18. was to take away those heritable jurisdictions, formerly vested in individual barons, which had been found so extremely prejudicial to the regular administration of justice, while it reserved entire the

tion of the Legislature, is in direct opposition to the saving clause in the statute, which applies only to jurisdictions then independent of the superior.

The Lord Ordinary having reported the cause on informations, the Court, by a majority, found, "That the present bailies of Greenock, named and appointed by the feuers and sub-feuers thereof, and John Campbell, the bailie named by the superior or baron of Greenock, acted illegally in so far as they exercised a higher jurisdiction than that of baron-bailies; and that they and their successors in office are not entitled to exercise any higher jurisdiction than that of baron-bailies, as laid down by 20 Geo. II. c. 23."

A reclaiming petition was appointed to be answered, and afterwards a hearing in presence ordered; and upon advising the cause, a considerable majority of the Court were of opinion, that the charter in the year 1751 could have no effect in the determination of the cause, as the superior could not confer a jurisdiction on the burgh of which he himself had been previously divested.

The question therefore came to be, Whether the burgh was independent of the baron, in the sense of the jurisdiction-act, at the date of the statute? And on this point there was a considerable diversity of sentiment.

Several of the Judges thought, that the statute, although not very clearly worded, applied only to villages within a barony which are not incorporated, and to burghs of barony having no magistrate other than a baron-bailie, removable at the pleasure of the baron, not to burghs such as Greenock, which, although locally situated within a barony, are incorporated by charter from the Crown. The erection of such a burgh (it was observed) is not so much intended for the benefit of the baron as of the inhabitants. The charter of erection has the effect of instantly creating a distinct political corporation separate from the baron, with appendent privileges, which he can neither take away nor infringe. For instance, he cannot refuse to name bailies, nor can he remove or control them during the term of their office; and although he may resign or convey his own baronial right, he cannot dispose of the burgh or its privileges, because he would thus be taking away the *jus quæsitum* of the burgeses.

On the other hand, a majority of the Court were of opinion that the erection of a burgh of barony within a barony previously created, is merely an amplification of the right of the baron, obtained by his own desire, and chiefly for his own advantage. That the superior of Greenock, before granting the charter 1751, not only had the sole power of naming bailies and of receiving burgeses, but might, even at that time, have for ever resigned the burgh into the hands of the Crown without the consent of the inhabitants: That burghs, in the situation of Greenock, had uniformly

burghs of a tenth of the cefs formerly paid by them. This burden ought therefore not to be exigible from the whole inhabitants of fuch burghs, but only from thofe who are immediately and directly benefited by thofe privileges, of which it may be confidered as the price: And accordingly, the act 1693 authorifes the magiftrates to appoint ftent-mafters “for laying on the burden upon *the trade*, and others who have benefit by trade;” thus clearly pointing out, that the tax is to be paid only by foreign merchants; the laft words, “others *who have benefit by trade*,” plainly including only perfons *retailing foreign commodities*, who, although they do not trade themfelves, yet derive a *direct benefit* from it.

For the fame reason, the ftatute authorifes the laws, fecuring the trade to royal burghs, to be put in execution only againft “fuch *unfree traders* in burghs of barony as fhall not undertake for and pay a proportion of faid quota.”

Farther, the act 1698, c. 20. enacts, “That the faid quota and fubdivifion being once ftated, all perfons, inhabitants of the faid burghs, *partaking of the communication*, fhall be ftented for the quota appointed.” Now, thefe words, “*partaking of the communication*,” clearly qualify the general words, “*all perfons inhabitants*,” as they cannot be fupposed to refer to the immediately preceding word, “*burghs* ;” for the quota could not poffibly be laid on any other burghs except thofe which had accepted of the communication; and therefore it would have been quite fuperfluous to have faid, that the quota was to be laid on “*burghs partaking of the communication*.”

The plea of the fufpenders is likewise confirmed by the act 1698, c. 19. which clearly fhews, that the foreign trade was meant to be affeffed, and that every kind of home trade or manufacture might be carried on as formerly without limitation or control.

Answered : It is clear from all the ftatutes, that it was not any particular clafs of inhabitants, but the burghs of regality and barony themfelves, which were to be affeffed. Thus, in the preamble of the act 1693, it is ftated, “That the convention of royal burghs, &c. being willing to communicate the benefit of trade, &c. in favour of *burghs* of regality and others that could relieve them of a proportional part of the burden impofed upon trade, &c.” It enacts, “That fickle execution fhall pa againft the *burghs* of regalities, baronies, &c. as is ufed for in bringing of the cefs payable to their Majefties by the royal burghs ;” and a fubfequent claufe provides for equality in levying the burden within the *burghs* themfelves partaking of the communication. The act 1698, c. 19. alfo declares, that thereafter foreign trade fhall be “the privilege of freemen and burgesfes of *burghs royal*, and of fuch to whom the faid privilege fhould be communicate.”

It is alfo enacted by the 1698, c. 20. that burghs obtaining the communication fhall be affeffed for their quota, “as is the ufe in royal burghs.” Now the act 1592, c. 155. provides, “Thar
“ al

“ all manner of persons, inhabitants of burghs, concerned in any manner of traffic, merchandise, or having *change* within the same, shall bear their part of all taxes, stents and taxations,” &c. And this statute is confirmed by the act 1594, c. 226. which enacts, “ That the samen shall be extended to all merchants or craftsmen, as well free as unfree, that has no other dwelling-place but within burgh,” &c.

As, therefore, if the suspenders had resided in a royal burgh, they would have been liable for the tax, it is evident, from the provision of the 1698, c. 20. that they must also be liable for it as persons residing and having change in a burgh of barony which enjoys the communication of trade.

The suspenders would confine the expression, “ others who have benefit by trade,” in the act 1693, to the retailers of foreign commodities. But there is nothing to warrant this construction; for such retailers derive no more benefit by the communication than craftsmen, or other persons who carry on any sort of manufacture.

Observed on the Bench : Every manufacturer and mechanic derives an obvious benefit from the communication of trade, because it must increase his employment, and therefore he ought to pay his proportion of the tax. With respect to the *quantum*, a discretionary power is in the first instance lodged in the stent-masters and magistrates. If they abuse it, (which is not alleged in the present action), this Court will give redress. See 16th June 1759, *Wilson* against Magistrates of Glasgow.

The Lord Ordinary had found the letters orderly proceeded.

The Court unanimously adhered, and found the suspenders liable in expences*.

Lord Ordinary, *Ankerville*.
For the chargers, *G. Fergusson*.

For the suspenders, *Cullen*.
Clerk, *Sir James Colquhoun*.

R. D.

N^o CXX.

* A similar decision was at the same time given in the case of *Gray* and others against the Bailie and Stent-masters of Dalkeith.

N° CXX.

May 28. 1794.

The COLLECTOR of the Poores Rates in the Parish of Inveresk,

AGAINST

The MAGISTRATES of Musselburgh and Sir ARCHIBALD HOPE.

Poor.—Proprietors of mills, and of coal and salt works, are liable to be assessed for the maintenance of the poor.

THE heritors and kirk-session of the parish of Inveresk some years ago imposed an assessment for the maintenance of the poor. The magistrates of Musselburgh, who have mills within the parish, which they let in lease, and Sir Archibald Hope, the proprietor of extensive coal and salt works, also within the parish, refused to pay any part of the poors rate for these subjects.

The collector appointed to levy it brought an action, concluding against them for a proportion of the assessment, corresponding to the yearly rent or value of these respective subjects, and

Pleaded: By the act 1579, c. 74. the whole inhabitants of the parish are to be taxed for the maintenance of the poor. By the subsequent statutes, 1663, c. 16. and 1672, c. 18. the assessment is directed to be made according to the old extent or valued rent or otherwise, as the major part of the heritors shall agree. And this discretionary power of assessment is further confirmed by two acts of the Privy-council in 1692 and 1693, (Statute Law Abridged, voce Vagrant, p. 389.), in which the heritors and kirk-session are simply authorised to lay on such an assessment as may be sufficient, without being confined to any rule.

Their powers being thus ample, it seems to be a question of equity and common sense, in what proportion those having interest in the parish ought to be assessed? Of consequence, with the exception of personal property, as being too uncertain to admit of fixed estimation, the rule will be, that each individual should contribute precisely according to the emolument that accrues to him from his property; Wallace, 19th January 1773, Collector of the assessments of West-kirk Parish against Frazer. There is no ground for distinguishing between an heritor, whose revenue arises from the fruits of the surface, and another who derives

“ cular circumstances of each case, and to do as he shall see
 ‘ just.’ ”

Lord Ordinary, *Craig*.

Adv. Fraser-Tyler, Davidson.

For the Magistrates of Muffelburgh, *G. Fergusson.*

For Sir Archibald Hope, *Hope.*

R. D.

N° CXXI.

June 3. 1794.

HUGH CRAWFORD, and Others,

AGAINST

JOHN WILSON, and Others.

PUBLIC BURDEN.—*The householders in a country village are indiscriminately liable to the burden of having soldiers billeted upon them.*

BEITH is a country village in the county of Ayr, consisting of nearly 800 inhabitants. Since the year 1787, from thirty to forty soldiers have generally been quartered there, and lately the number was increased to eighty.

After various methods of billeting them had been tried and abandoned, two of the Justices of Peace of the county authorised a committee of the inhabitants to superintend this branch of the police.

John Wilson, the billet-master appointed by them, granted billets on all the inhabitants indiscriminately, schoolmasters, widows, unmarried women, and paupers, excepted.

Hugh Crawford, and others, styling themselves a committee of the *private* inhabitants, presented a bill of suspension and interdict, praying the Court to prohibit the billeting of soldiers upon them and their constituents. They admitted, that in cases of *transient* quarters, or of emergency, this burden must fall on all classes of the inhabitants; but they contended, that in the ordinary case of *local* quarters, it should be confined to innkeepers and dealers in provisions*; and

Pleaded: At common law, every man is entitled to the exclusive possession of his own house. The billeting of soldiers upon any person

* Under this last denomination, they seem to have included “ butchers, bakers, candle-makers, grocers, hucksters, meal-mongers, and common cow-keepers.”

erson except innkeepers, who are obliged to furnish quarters to all the lieges, is a limitation of this privilege introduced by positive statutes, and cannot go beyond their enactment. Now, the only statutable provisions previous to the Union, relating to this subject, are the acts of Convention 1667 and 1678, and the acts of Parliament 681, c. 3. 1689, c. 32. and 1690, c. 6. 1693, c. 4. 1695, c. 33. and 1698, c. 9. all of which either prohibit free quartering altogether, or allow it only on dealers in liquors or provisions. And the annual mutiny-bill declares, that it shall only be lawful to quarter soldiers in Scotland in such and the like "places and houses," as they might have been quartered by virtue of the laws in force at the time of the Union; which evidently implies, that certain houses were exempted, and these could be no other than those of the private inhabitants. Accordingly, they have possessed this immunity by the immemorial and uniform usage of almost every considerable town in Scotland, and it has also been recognised by the decisions of the Court; 10th February 1785, Procurators of Glasgow against the Magistrates *; Fac. Coll. 6th February 1789, Earl of Wemyss, and others, against the Magistrates of Canongate.

Besides, it is reasonable in itself, that innkeepers, and those who sell provisions, should be primarily subjected to this burden, as they derive an obvious benefit from the dealings of the soldiers.

Answered: The only statute of any consequence regulating the quartering of soldiers, is the 1698, c. 9. which subjects to this burden persons of all descriptions living in burghs or market-towns, while it frees from it tenants dispersed in the country, an exemption which strengthens the general rule.

But even although in common cases soldiers should only be quartered on certain descriptions of persons, yet in times of war, like the present, which render a larger military establishment necessary for the defence of the country, every person must bear a share of the burden.

The advantage which innkeepers and dealers in provisions derive from soldiers is exceedingly trifling; and at any rate, merchants, shoemakers, tailors, &c. all of whom come under the description of *private* inhabitants, are fully more benefited by their dealings.

The Lord Ordinary took the cause to report on the bill, with answers and replies.

The Court were clear, that Beith, not being even a burgh of barony, and all the inhabitants being nearly of equal rank, there was not the smallest ground for any class of them pleading immunity from the burden in question.

Several of the Judges doubted the propriety of the decision in the case of the Canongate in 1789, exempting inhabitants of a superior

superior rank, and altogether unconnected with trade. In England (it was observed) the whole of this burden is no doubt placed upon innkeepers. But there it is imposed upon them by special statute, and they know precisely what they have to expect when they choose that line. In this country, however, no such statutable regulation has ever existed; and besides there are not a sufficient number of inns to accommodate the troops. Since therefore part of the burden must fall on the private citizens, it should be shared among all ranks with the most perfect equality. In fact, it is more severely felt by a tradesman, who in many cases has but a small house, than by a gentleman of fortune, who, if he does not incline to have soldiers in his family, can afford to provide them with quarters elsewhere. Accordingly, in a case from the Calton of Glasgow in 1779*, the Court were of opinion, that no distinction should take place among the different classes of inhabitants. A contrary judgment was indeed given, both in the case of the Procurators of Glasgow in 1785 and in that from the Canongate in 1789. The former however went very much on specialties. The latter, and the case from the Calton of Glasgow, are therefore in fact the only two judgments upon the general point; and as they received opposite determinations, the question may still be considered as open for future discussion.

The Court refused the bill.

Lord Ordinary, *Matheson*.
Alt. Geo. Fergusson.

For the suspender, *Greenfields*.

R. D.

N° CXXII.

June 6. 1794.

JAMES HARDIE DOUGLAS, and Others,

A G A I N S T

The TRUSTEE for the Creditors of Thomas Hay.

ASSIGNATION, TACK, COMPETITION.—*How far an assignation to sub-lease, in security of debt, intimated to the principal lessee, but which no possession has followed, is a valid ground of preference competition with personal creditors of the cedent?*

THOMAS HAY granted assignations of a sublease of a farm possessed by him to James Hardie Douglas and two other creditors, as a further security for debts due to them. None of the

* Not collected.

The bankruptcy of the debtor is no objection to the intimation, as no diligence had been raised against his estate by the other creditors. Indeed, intimation was altogether unnecessary in this case; for although in competitions between different assignees, the preference depends upon the date of the intimation, in those between assignees and other creditors, the former rank according to the dates of their assignments; 8th July 1785, Hay against Sinclair *.

The Lord Ordinary sustained the objections to the interest of the assignees, as being "assignments to a lease *retenta possessione*, " and not intimated till after the bankruptcy of Thomas Hay."

A petition against this interlocutor was followed with answers. The Court ordered memorials; upon advising which, it was

Observed on the Bench: The trust-deed is reducible on the act 1696; at any rate, it was not intended to affect the rights which creditors had already acquired. The assignees must therefore be preferred to the trustee.

Possession is so far essential to the conveyance of a lease in security of debt, that without it the assignee has only a personal right, consequently a subsequent assignee or adjudger getting first into possession would be preferred. At the same time, were a process of adjudication to be brought, the assignee might insist to be put into possession before the right of the adjudger could be completed, and a summary application to the Judge Ordinary to that effect would be competent.

The intimation in the present case had no effect in completing the right. When the principal lessee assigns his lease, the right of the assignee is completed by intimation to the subtenants, requiring them to pay their rents to him; when again the subtenant is the granter of the assignment, the right of the assignee can only be completed by actual possession of the subject, though, in the mean time, an intimation to the principal lessee may be proper in order to render the transaction public. It is no objection to the intimation, that it took place after the bankruptcy of the cedent. That event does not prevent creditors from taking any step for their own safety which can be done without the intervention of their debtor.

The Lords, by a considerable majority, "altered the interlocutor reclaimed against, repelled the objections to the interests produced for the petitioners," (assignees), "and preferred them upon the funds *in medio* arising from the sale of the lease."

A reclaiming petition was refused without answers on the 24th June 1794.

Lord Ordinary, *Stonefield*.
Alt. *Montgomery*.

For the assignees, *David Williamson*.

* Not collected.

D. D.

N^o. CXXIII.

“ they paying to me and my foresaids the sum of *two shillings*
 “ *Scots money* each of the said times for granting the said rights,
 “ and being at the expences of drawing and forming thereof
 “ and relieving me and my foresaids of the causes for which i
 “ shall happen their said escheats to fall ; and binds and oblige
 “ me and my foresaids, that we shall not, at any time hereafter
 “ lye out unentered of the said lands, to the prejudice of the sai
 “ John Walkinshaw and his foresaids ; and that we shall free an
 “ relieve them of all damage that they or any of them can fi
 “ stain through the wård or relief of the saids lands, or othe
 “ ways whatsoever manner of way, through their holding th
 “ samen of me and my foresaids.”

Lord Sempill having acquired the estate by a singular titl
 Thomas Brisbane, the heir of the original disponer, brought a d
 clarator of non-entry, where the question came to be, wheth
 Lord Sempill, as a singular successor, was liable for payment of
 year's rent for his entry, or if he was entitled to be entered f
 two shillings Scots money, in terms of the above mention
 clause. The defender

Pleaded: 1st, The original disposition to John Walkinshaw b
 ing granted to him, his heirs and *assignees*, and not only t
 clause in question, but the whole intervening clauses, being co
 ceived in favour of him and “ *his foresaids*,” these words are
 all respects equivalent to a repetition of the phrase “ *heirs* a
 “ *assignees*,” and of course, as an assignee, the defender is entit
 to an entry, on payment of the above taxed sum.

2^{dly}, The obligation on the superior, contained in the clau
 above mentioned, is sufficiently broad to comprehend every po
 sible case in which an entry could be required, either by an be
 or a singular successor.

Answered: It was not till the 20 Geo. II. that the superior w
 obliged to enter voluntary dispones, and by that statute he got
 year's rent as a compensation for this innovation on his right
 His title to exact it is considered as one of the essential and inhe
 rent rights of superiority, and every limitation of it is held *stric*
tissimæ interpretationis, Macdowall, b. 2. t. 4. § 34. and is never to
 be presumed from any equivocal expression in the original charter.
 The sole purpose of the above mentioned clause was to provide
 against the superior's taking any advantage of the lands falling into
 his hands by a feudal delinquency. It says not a word of singu
 lar successors, and was never meant to remit the composition due
 on their being received. Accordingly, in many cases, where the
 clauses founded on were much more favourable for the vassals
 than the one in question, the superior has been found entitled to
 a year's rent; Fac. Coll. 2d February 1769, Magistrates of
 Inverness against Duff; Falc. 25th July 1751, Salmon against
 Boyd; December 1789, Mercer against Grant; July 1791, Du
 of Queensberry against Smith; 1778, Sir W. Hamilton against
 Earl of Lauderdale *.

The

* The three last cases not collected.

The Lord Ordinary reported the cause on informations.

The Court were clear upon the grounds stated for the pursuer, that the entry of singular successors was not taxed by the charter in question. It was further observed, that the circumstance of the parties having agreed to score the blank which had originally been left for the purpose of filling up a fixed composition, to be paid on the entry of a singular successor, afforded additional evidence that they meant to leave that matter to be regulated by the common law, and that the general clause founded on by the defender was intended solely to provide against the lands remaining with the superior, in consequence of a feudal delinquency.

The Court found, " That Lord Sempill was not entitled to be entered as a singular successor in the lands in question, but upon payment of a year's rent, in terms of the statute of the 20th Geo. II."

Lord Ordinary, Justice-Clerk.
Clerk, Home.

Akt. Honyman.

Akt. Dean of Faculty Erskine.

R. D.

No CXXIV.

June 10. 1794.

The MINISTER of Kingbarns,

A G A I N S T

The Honourable HENRY ERSKINE, and Others.

GLEBE.—*Temporal lands cannot be designed for a glebe in a parish in which there are church-lands, however distant they may be from the manse.*

THE parish of Kingbarns was in 1631 disjoined from the parish of Crail. A manse and offices were built for the minister of the newly erected parish, but no glebe was designed for him.

The present incumbent having applied to the presbytery for the designation of a glebe, they assigned for this purpose four acres of temporal lands lying contiguous to his manse. There are church-lands in the parish, but the nearest of them are distant from the manse at least three quarters of a mile.

4 A

The

The proprietors of the temporal lands brought a suspension of the proceedings of the presbytery, in support of whole sentence the minister

Pleaded: The object of the Legislature in allotting a glebe to every minister of a country parish, was to provide him with all those articles in kind, which are requisite for the accommodation of his family; and to answer this end, the glebe should be in the immediate vicinity of the manse and offices. With this view, the acts 1572, c. 48. and 1592, c. 116. declare, that the glebe shall be designed from land "lying contiguous or next nearest" to the manse; and the act 1606, c. 4. that if there is no arable land near the manse, pasture land shall be given to the minister rather than that he should be subjected to the hardship of having his glebe at a distance.

The act of Convention 1644, c. 31. still more effectually provided for its adjacency. And from the act 1663, c. 21. it appears, that so much was it considered as a fixed point that the glebe should be near to the manse, that the Legislature thought it necessary to adopt a regulation of the act of Convention 1644, c. 45. exempting incorporated acres in towns from being designed for that purpose, upon the heritor's giving other lands nearest the kirk.

In no statute is it said, that where there are church-lands in a parish, temporal lands cannot be designed. On the contrary, the 1649, c. 45. expressly enacts in general terms, that where glebes are situated at an inconvenient distance, new ones shall be designed, within a quarter of a mile from the manse, without making any distinction between church and temporal lands; and although this statute, as well as the 1644, c. 31. fell under the rescissory act in 1661, yet both were virtually renewed by the 1663, c. 21. where its words are nearly adopted. These acts of Convention, accordingly, are held by all our lawyers to be still in force, and on this ground alone it has long been established, that where there are no church-lands in the parish, temporal lands may be designed, in terms of the act 1644.

It is no doubt true, that the acts 1572, c. 48. and 1593, c. 165. mention church-lands as those out of which glebes are to be designed, but the statutes founded on by the charger are of much later date. Besides, at the Reformation, and recently after, it was sufficient for the Legislature to declare, that glebes should be given out of church-lands, because, in the parishes then existing, there were generally plenty of such lands the most fertile in the parish. But, when in consequence of the various commissions appointed in the beginning of the last century, the old divisions of parish were much altered, many new ones erected in which there were no church-lands at all, and in building churches and manses, the convenience of the parishioners was more studied than that of the minister, (1621, c. 5.) the regulations of the subsequent statute authorising the designation of temporal lands became necessary.

Were the doctrine of the suspender well founded, it would follow, that if there were only four acres of church-lands in the parish, and each at a distance from the rest, the charger must take the

them as his glebe, which surely could never be the intention of the Legislature; see Fount. 27th December 1709, Linnen against Baillie; 6th December 1710, Potter against Ures; 31st January 1712, Steel.

Answered: Although the statute 1563, c. 72. made no distinction between ecclesiastical and temporal lands, it is plain that in consequence of it ministers got right to glebes only in those parishes where before the Reformation the parson or vicar had enjoyed that accommodation. Accordingly, the act 1572, c. 48. made to explain it, expressly appoints the *new* glebe to be designed out of the old one, the consequence of which was, that although there were church-lands within the parish, no designation could take place, unless there was an old glebe; Mackenzie's Observ. on James VI. Parl. 3. c. 48.; Durie, 11th February 1631, Minister of Inverkeithing against Kerr. The act 1592, c. 116. extended the privilege of a manse and glebe to those parishes where there had been none before, provided there were in the parish lands formerly belonging to cathedrals or abbeys, out of which they could be designed. The act 1593, c. 165. was the first which gave the clergy in general a right to them out of any kirk-lands in the parish according to the order therein laid down.

As, however, in terms of this statute, the minister might be obliged to take his glebe out of lands at a distance from his manse, while there were others belonging to a more favoured order of the clergy in his immediate neighbourhood; the act 1606, c. 7. provided that ministers subjected to this hardship should be entitled to 16 founs of grass, "and that of the maist commodious and best pasturage of ony *kirk*-lands lyand next adjacent and maist nearest to the said kirks."

The act of Convention 1644 declared, that it should be competent to design manses and glebes out of *kirk*-lands, in terms of the act 1593, and where there are no *kirk*-lands within the parish, or when the same are mortified to universities, schools, or hospitals, that it should be lawful to design them out of temporal lands.

The act 1649, when it provides that glebes inconvenient from their situation should be changed, and new ones designed within a quarter of a mile from the manse, applies only to the case where there were church-lands to be found within that distance. At any rate, both these acts of Convention 1644 and 1649 are now rescinded. Neither does it follow from the act 1663, c. 21. declaring that incorporated acres *are not* to be designed for glebes, that temporal lands *are* to be subjected to that burden, when their situation renders them most convenient for the minister. Accordingly, in consistency with this view of the statutes, it is a point settled by the opinions of all our law-writers, and by the decisions of the Court, that temporal lands can be allocated only where there are no church-lands in the parish; Stair, b. 2. t. 3. § 40.; M'Dowall, b. 2. t. 8. § 126.; Ersk. b. 2. t. 10. § 59.; Durie, 13th July 1636, Lamond against Bennet; Stair, 6th February 1678, Lord Forret against Maters; Dict. vol. 1. p. 351; July 22. 1622, Nicolson against Porteous.

The

The advantages arising to the minister from the opposite doctrine are much exaggerated, at any rate, such views cannot be attended to in opposition to the enactments of the Legislature.

The Lord Ordinary reported the cause on informations.

The Court were much divided in their sentiments. Several of the Judges were of opinion, that where the church-lands in a parish lie at an inconvenient distance, ministers are entitled to have their glebe designed out of temporal lands. The Legislature, (it was observed), certainly did not intend that the clergy should be obliged to let them in lease to a tenant, which would often be the inevitable consequence of the suspender's doctrine. The act of Convention 1649 clearly implies, that temporal lands were subjected to this burden, and that the ministers of all landward parishes were to be provided in glebes near to their manses and offices; and although the statute 1663 is shortly expressed, the same conclusion may fairly be drawn from it, especially if the practice over Scotland is to have any weight in its explanation, where a single instance will scarcely be found of a minister having his manse and offices at the distance of a mile from his glebe, which nevertheless must frequently have occurred, if it had been understood that he might have been obliged to accept of church-lands, however remote, if within his parish.

On the other hand, a majority admitted the hardship on the minister, but were of opinion, that as in this question the power of the Court arose entirely from statutes, they were bound to adhere to their strict letter, and that on a sound construction of them, church-lands *in suo ordine*, when within the parish, must in the first place be designed, especially as this was the opinion of Stair, whose authority must have great weight in all cases like the present, which turn upon the construction of our older statutes, and where the point is not settled by a train of decisions.

The Court, by a narrow majority, found, that the lands allocated by the presbytery, being temporal lands, are not liable to be designed when there are church-lands in the parish; and therefore sustained the reasons of suspension of that designation.

On advising a reclaiming petition with answers, the Court adhered.

Lord Ordinary, *Monboddo*. For the Charger, *Tait, James Clerk, Monypenny*.

For the Suspenders, *Dean of Faculty Erskine, D. Catbcart*. Clerk, *Home*.

R. D.

N° CXXV.

Answered: It was the object of the act of Parliament to give the privilege of being conjoined to all creditors, who, had there not been danger from delay, might effectually have led separate adjudications. The claimant might have done so in the present case. The reservation of all objections *contra executionem* in the adjudication, must have the effect of preventing any objection which can be afterwards removed from hurting the diligence. There is no good reason for distinguishing the present from an objection which affects the amount of the debt. The Court have sustained adjudications led upon grounds much more exceptionable, as upon expired bills, and upon English and York-building Company's bonds, after the lapse of the long prescription, allowing these objections to be removed by subsequent productions.

The Lord Ordinary sustained the objection, in respect "that by the clause of the statute, in virtue of which the respondent (Fleming) claimed to be conjoined in the adjudication, and was conjoined, reserving all objections *contra executionem*, the creditors only who are in readiness, and have their grounds of debt to produce can be effectually conjoined."

On advising a reclaiming petition and answers, it was

Observed on the Bench: An adjudication can proceed only upon a decree of constitution, or a liquid document. The copy and protest show that the bill once existed, but not that it is really owing. The case may be hard, but this can have no weight in a question among creditors.

The Lords unanimously adhered, by two consecutive interlocutors.

Lord Ordinary, *Dregburn*.
Clerk, *Menzies*.

For the Creditors, *M. Ross*.

Alt. *Maconochie*.

D. D.

3. The evidence is in many cases stated verbatim in their writing, and is not only admitted, but because it was in the power of the party to whom it was given by the court. But when money is assigned, an account is given by the court. It is indeed generally stated in the decision, or in one of the items of process. The object of such a statement is to show to the clerk of court, who is the only one who is authorized for the institution. If he should lose any money, he would be competent to prove to the court that it had been assigned, and for the same reason, the court would in this case be competent.

4. The court is in fact the institution of a certain subject for certain purposes, and it is a general principle that deposition, wherever it is made of the subject required, may be proved from the court, and the court is competent.

5. The object of this action is not to establish a payment of money, but a claim of damages on account of malversation in office.

The Court, upon admitting the petition, which in turn, were clear and the evidence is not only admitted, but because it was in the power of the party to whom it was given by the court. But when money is assigned, an account is given by the court. It is indeed generally stated in the decision, or in one of the items of process. The object of such a statement is to show to the clerk of court, who is the only one who is authorized for the institution. If he should lose any money, he would be competent to prove to the court that it had been assigned, and for the same reason, the court would in this case be competent.

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D. D.

N° CXXVII.

July 1. 1794.

THOMAS RYDER and his Attorney,

AGAINST

The CREDITORS of Hugh Rofs.

ADJUDICATION.—HERITABLE and MOVEABLE.—*Where an adjudication has been obtained in security of such termly payments of an annuity as should afterwards become due, the arrears between the date of the decree and the death of the annuitant go to the heir.*

MRS ELIZABETH ROSS obtained from her husband a bond of annuity, payable quarterly, in case of her surviving him. Each termly payment was enjoined under a penalty, and was to bear interest from the time it became due.

After her husband's death, she led an adjudication against the estate of her son Hugh Rofs, "in security and payment" of such termly annuities as should become due during her life.

Mrs Rofs afterwards conveyed her personal property to Thomas Ryder, whom she appointed her executor and trustee.

Hugh Rofs was her heir.

In the ranking of his creditors, it came to be a question, whether certain arrears of her annuity which had become due after the date of the adjudication, belonged to her heir or executor?

The creditors

Pleaded: It is a settled point, that interest falling due upon a debt secured by adjudication, goes to the heir; Kilk. 1st December 1738, Ramsay against Brounlie; 16th January 1786, Baikie against Sinclair. These decisions were given upon the principle, that an adjudication is a proper sale of the debtor's estate, burdened with a power of reversion, on payment of the principal, interest and expences, which are thereby all consolidated into one indivisible sum.

The executor

Answered: The decisions of Ramsay and Baikie, and the principles on which they proceeded, are inapplicable to this case. Apprisings were originally sales under reversion; and although the modern adjudications for debts already due might more properly have been considered as improper wadsets, yet to prevent the confusion which an alteration of practice in that particular would have occasioned, the same legal effects have been attributed to them. But an adjudication like the present has no resemblance to either.

It has no legal as other adjudications, and it cannot be redeemed on payment of any known specific sum. It cannot therefore be considered as a sale, as no price is either paid or fixed on. In short, the adjudication in question is precisely of the same nature with a voluntary investment of annual rent, and there is no reason that arrears on the one should be in a different situation from those on the other.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: An adjudication for future annuities is security for a conditional debt; but so soon as they are due, it becomes a security for a pure one. The lands are then adjudged *in solutum* of the arrears, payment of which becomes a condition of the reversion. The interest due upon these termly payments, is likewise heritable, upon the principle which has uniformly been considered as settled by the case of Ramsay, Kilp. 3.

The Lords unanimously "found, That in virtue of the decree of adjudication obtained by the deceased Mrs Elizabeth Ross, the annuities in question were rendered heritable property, and now descend to the heir."

Lord Reporter, Swinton.
Clerk, Sinclair.

For the executor, Hope.

Alt. Honyman.

D. D.

N° CXXVIII.

July 9. 1794.

JOHN NEWLANDS and his Tutor *ad litem*,

AGAINST

The CREDITORS of John Newlands.

FIAR.—*Where heritable subjects are disposed to a father “in liferent, “for his liferent-use allenary, and to his children nascituris in “fee,” the fee cannot be attached for the debts of the father.*

ALEXANDER NEWLANDS, on the 10th June 1771, disposed certain heritable subjects to Lieutenant John Newlands, “during all the days of his lifetime, for his liferent-use allenary, “and to the heirs lawfully to be procreated of his body, in fee;” whom failing, to his nearest lawful heirs whatsoever.

Alexander Newlands having, before the execution of this deed, contracted the disease of which he died on the 17th July 1771, it was reducible on the head of deathbed. Having however left no heirs, the disponent, who was his natural son, obtained from the Barons of Exchequer a gift of *ultimus hæres* of the subjects contained in it.

The gift was granted precisely in the same terms with the disposition, viz. “Joanni Newlands durant. omnibus suæ vitæ diebus, pro ejus vitali redditu solummodo, et hæredibus legitime ex ejus corpore procreand. in feodo; quibus deficient. propinquo-ribus legitimis hæredibus dict. demortui Alexandri Newlands quibuscunque.”

Lieutenant Newlands afterwards became insolvent, and a process of ranking and sale of his heritable property having been brought, which included the subjects contained in this gift, John Newlands, his eldest son, presented a petition, stating, That his father, under the titles before mentioned, was merely a liferenter, or held only a fiduciary fee for his behoof, and therefore praying the Court, “to ordain the whole of the said heritable subjects to be struck out of the sale of the subjects belonging to Lieutenant Newlands, in so far as concerns the fee of the said subjects.”

In opposition to this demand, the creditors of Lieutenant Newlands

Pleaded: It is an established maxim of the law, that a fee cannot be *in pendente*. Accordingly, when a right is granted to a father *in liferent*, and to his children, *nascituris in fee*, an absolute fee is held to be in the father, although, *ex figura verborum*, he is only vested with the liferent; Clerk Home, 25th November 1735, Creditors of Frog against his Children; Kilkerran, p. 190. v. Fiar, 4th February 1741, Lillie against Riddell; Fac. Coll. 29th June 1786, Mure

might have been entirely frustrated, by the heritor obtaining a sale of his teinds, and the reverser redeeming the wadset, or adjudged lands.

Many difficulties would even result to third parties from the petitioner's plea. For instance, if the former proprietor had contracted debts, his creditors, although their debtor had the unlimited property, could not affect the subjects by the ordinary forms of diligence, such as by charging the heir to enter, &c.; or if the liferenter or fiduciary fiar should renounce his right, it is not easy to discover how matters could be settled between the superior and the fiar in expectancy.

Besides, a fiduciary fee is in no respect more favourable than an entailed one; and, therefore, although old Newlands had intended to create such, as he has not done it in express words, it is not to be inferred by implication; 24th November 1769, Edmonstone against Edmonstone.

The petitioner's construction of his grandfather's settlement appears therefore in every view to be attended with inextricable difficulties; to avoid all which, it has been held in two very similar cases, that an absolute fee is vested in the nominal liferenter; Fac. Coll. 7th July 1761, Douglas against Ainslie; 1st March 1781, Cuthbertson against Thomson.

Answered: The maxim that a fee cannot be *in pendente*, owed its origin to the strict ideas formerly entertained respecting ward-holdings, where it was held that a superior could not be deprived of the personal services of his vassal. Even then, however, it was not without its exceptions, as in the period between the death of the vassal and the entry of the heir, or where the deceased had prohibited the entry of the heir *alioqui successurus*, while there remained possibility of the existence of one more nearly related to him; Balr. 2d January 1708, Mackenzie against Lord Mountstewart; its soundness has long been doubted, Dirleton, *voce* Fiar, No. 9, 10. A late writer has said, that it "has no foundation either in law or in nature;" Ersk. B. 2. tit. 1. § 4. and no bad consequences arise to third parties from disregarding it.

It is sufficient for the interest of the superior, that a mere liferenter is entered; and even if he should have no vassal, he gets the non-entry duties for his indemnification. The vassal suffers no hardship when the fee of the superiority is vacant, as he can get an entry from his next immediate superior; and the creditors of the ancestor may attach the estate, by directing charges against the heir *alioqui successurus*. In the case, 12th February 1748, Gordon against the Creditors of Carleton, reported by Kilkerran, p. 512. it was found, that the fee remained with the disponent, when at his death the institute fiars were *nascituri*, and never afterwards existed. See also Kames, 3d August 1756, Forbes against Forbes. On the same principle, a charge given to the heir-at-law will be perfectly regular, even where there is a possibility of the existence

of the institute fiars, as the fee remains *in hereditate jacente* of the disposer, and is descendible, according to the ordinary rules of succession, till there is some person entitled to take it up, in virtue of the personal right created in favour of the fiars in expectancy. When such fiars exist, they will indeed be entitled to serve heirs of provision to the fee, or to take it directly under the disposition or if the heir *alioqui successurus* is entered, to compel him to denude. But still the measures taken by the ancestor's creditors in the mean time will be effectual.

Even if it were admitted that a fee cannot be *in pendente*, it is clear, that in the cases in which it was found that a grant simple in liferent conferred an absolute fee on the father, the judgment did not proceed on this principle, but upon established practice and the presumed will of the disposer. For although the Court, on account of a *necessitas juris*, had been obliged to find that an absolute fee remained with some person *in existence*, subject merely to a burden of the liferent, surely the heir *alioqui successurus* was the person entitled to it, and not the liferenter, had it not been known that this was the form of expression uniformly used by conveyancers to vest the fee in the latter. If the fee had been given to the liferenter, as the respondents argue, merely because it could not be *in pendente*, it is equally clear, that he must have been bound to denude in favour of the donees *nascituri*, immediately on their birth. In no case however has his right been so restricted.

But, on the other hand, when a subject is granted to a person in liferent *allenary*, or for his liferent-use *allenary*, and to his children *nascituris* in fee, then, in consequence of this taxative word *allenary*, no further substantial interest than that of a liferent, in the common acceptation of that term, is conferred on the father. Long established practice has given it this technical meaning; and upon the faith of its receiving this effect, many family-settlements have been framed; Stair, 4th February 1681, Thomsons against Lawson; Fac. Coll. 14th June 1781, German against Alexander; 8th March 1791, Ross against Rosses*.

It is evident, that the petitioner is under no necessity of maintaining that a fiduciary fee was vested in his father for his behoof. But were it even necessary to have recourse to a fiction of this sort, no bad consequences would follow. Such trust fees were very common in the law of Rome, *l. penult. et l. ult. cod. commun. de leg.* they are often resorted to in our practice, and still more frequently in that of England, in order to accomplish the views of proprietors.

The Court advised the cause after a hearing in presence.

The whole Bench were clear, that the intention of old Newlands was, that his son should not have the disposal of the fee.
They

* Not collected.

They also in general agreed in the principle, that a fee cannot be *in pendente*. There is no subject (it was observed) without a proprietor. An estate descending from ancestor to heir, or conveyed by family deeds, can never be *res nullius*, though it may for a time remain *in hereditate jacente*; and by the law of Scotland, if it can find no other owner, it will belong to the King.

A majority of the Court were, nevertheless, of opinion, that the *voluntas testatoris* must decide this and every other question of succession, whether the subject be heritable or moveable, provided he expresses his will in a legal manner, which they thought old Newlands had done in the present instance. No abstract principle of law, it was observed, could have the effect of giving an estate to a person, upon whom the donor has declared he did not intend to bestow it. The maxim, that a fee cannot be *in pendente*, never produces any such necessity. In the present case it is to be held *fictione juris*, that a fiduciary fee was vested in Lieutenant Newlands, but which substantially is no more than a liferent, as it excludes the power of disposal, either onerously or gratuitously.

Several Judges, on the other hand, thought, that the word "allienarly" made no difference on the question. Even without it, (it was said), the simple destination to Lieutenant Newlands in liferent, and his children in fee, would have implied a prohibition from alienating the subject *gratuitously*. But the addition of the word "allienarly," or of any similar one, cannot prevent his onerous debts and deeds from being effectual against it. In the case of moveable rights, the will of the testator ought always to receive full effect. But, when the subject is heritable, and the question comes to be with creditors and onerous purchasers, the will of the donor can be regarded only in so far as it coincides with the principles of our feudal law and the security of the records. In this case, the fee cannot be held to have been *in hereditate jacente* of old Newlands, because it is not disputed, that in making up titles his grandchildren must have served themselves heirs of provision, not to him, but to their father. As a fee of some sort therefore is vested in Lieutenant Newlands, and as it is not fettered by a strict entail, it must be subject to his onerous debts and deeds, however much he may be personally bound to give effect to the intended limitation. Indeed, the notion of a fiduciary fee, in cases like this, is not only repugnant to feudal principles, but highly inexpedient in itself, as, if once allowed, such fees might be continued through many generations and substitutions, and thus become a worse species of entails than any hitherto known, in so far as they neither would require irritant and resolutive clauses, nor to be recorded in the register of tailzies, nor would they be limited by the regulations of the 10 Geo. III. c. 51.

The

The Court, (7th February 1794), by a considerable majority,
“ordained the whole heritable subjects specially described in the
“gift of *ultimus hæres* to be struck out of the sale of the subjects
“belonging to Lieutenant Newlands, in so far as concerns the fee
“of the said subjects.”

On advising a reclaiming petition, with answers, the Lords
“adhered.”

For the Petitioner, *G. Fergusson, Hay, Macdonochie.*
M. Ross, C. Hope, Turnbull.

Alt. Lord Advocate Dundas,
Clerk, Sinclair.

R. D.

DECISIONS

OF THE

COURT OF SESSION,

From November 1794 to July 1795.

COLLECTED BY

ROBERT DAVIDSON and DAVID DOUGLAS, Esqrs;
ADVOCATES.

By Appointment of the FACULTY of ADVOCATES.

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DECISIONS

OF THE

COURT OF SESSION.

N° CXXIX.

November 12. 1794.

DAVID STEWART,

AGAINST

JAMES BURNSIDE.

SUPERIOR and VASSAL.—*A superior is not entitled to infest the vassal in a feu-right, without his consent, nor to insist that the infestment shall be expedite by his own man of business.*

SIR JOHN MAXWELL's commissioners granted a feu-disposition to James Burnside, his heirs and assignees, which was made out by David Stewart, writer to the Signet, Sir John's man of business, who also took infestment on the precept, and extended the feisin, without having received any orders from Burnside to that purpose.

Mr Stewart afterwards brought an action against Burnside, for payment of L. 3 : 19 : 1½, as the expence of the feu-disposition and infestment.

The Lord Ordinary found “ the defender liable for the articles charged in said account, in so far as relates to the execution of the disposition by Sir John Maxwell's trustees, in favour of the defender, amounting to L. 1 : 13 : 6½ Sterling ; but in so far as the articles in said account relate to the instrument of feisin, and taking infestment thereon, in respect it is admitted the de-

ther the particular writings founded on were sufficient to establish the constitution of the debt; Ersk. b. 3. tit. 7. § 18.; Dict. vol. ii. p. 120.; Forbes, 20th February 1708, Elliot against the Representatives of Veach; 15th January 1766, Donaldson against Murray; 7th March 1788, Carron Company against Bell; 14th February 1792, Hamilton against Cunninghame; 23d May 1792, Martin and Ker against Robertsons*.

Answered: The triennial prescription applies to a species of debts, which are seldom constituted by writing, and which are generally soon discharged. No prudent man will allow his house-rent, the wages of his servants, or the bills of his tradesmen, to be long due. Founding on the usual practice, the act 1579 introduced a legal presumption, that such debts are paid within three years after they are contracted. After that period, parole testimony is not admitted, because the witnesses who saw the debt contracted, cannot be sure that it may not have been afterwards discharged. Written evidence, however, is still competent, because writing will not be adhibited, unless where it is meant by granting a legal voucher to take the debt out of the common case, and therefore the writing to bar the prescription must prove resting owing, or at least be sufficient to take off the contrary presumption; Ersk. b. 3. tit. 7. § 18. b. 4. tit. 2. § 11.; Mackenzie's Observations on 1579; Bankt. b. 2. tit. 12. § 34.; Dirleton, *voce* Qualified Oaths; Stewart's Answers, p. 214.; Fount. vol. i. p. 92.; 11th November 1697, Stirling against Stewart; 21st February 1695, Dallas against Mackenzie; Harc. p. 215. November 1682, Tutor of Craigyvar against Gray; 19th November 1784, Ross against Shaw; Edgar, 11th February 1724, Guthrie against Marquis of Annandale.

Accordingly, in subsequent statutes, (1669, c. 9. and 1772, c. 72.) introducing short prescriptions, the language of the law having acquired more precision, it is expressly declared, that after the years of prescription the existence of the debt must be proved by writ or oath, although there can be no more reason for a presumption of payment in the cases to which they relate, than in those which fall under the triennial prescription.

Before the three years are expired, the creditor's books create so strong a presumption in his favour, that his oath in supplement only is necessary to establish his claim. After the three years, however, this proof is incompetent, merely because in the former case the presumption is in favour of the subsistence of the debt, and in the latter it is against it.

Besides, many absurd consequences would follow from the opposite view of the statute. A person living in the same town with the tradesman he employed, would have the benefit of the triennial prescription, whereas, a person residing in the country, who (as in the case in question), must necessarily send a commission in writing to town for what he wants, would be deprived of it merely on account of the carrier's receipt, which as it was granted without his knowledge, he would never think of retiring. In like manner, although house-rents and wages of servants fall

under

* The three last cases not collected.

under the triennial prescription, it would be barred in the one case by the cefs-books, and in the other by a written certificate of character, both of which completely establish the constitution of the claim.

The Lord Ordinary assailed the defender.

The Court were much divided in opinion.

On the one hand, it was

Observed: The carrier in this case is to be considered as the servant of Hislop, and the question is the same as if the receipt had been granted by himself. The furnishing being thus established by written evidence, the act does not apply. Some confusion has arisen on this subject, from not attending to the distinction between the two kinds of evidence, excepted from the limitation of the statute, and an erroneous opinion of Mr Erskine on the subject. When reference is made to the oath of the debtor, he is entitled to depone to the existence, as well as the constitution of the debt; it being reasonable that he should be allowed to extinguish the debt in the same way, that it is constituted against him, and therefore payment before as well as after the three years are expired, is an intrinsic quality in his oath. But where the creditor rests upon written evidence, it is sufficient that it prove the furnishing; for a debt instructed by writing, will, by the common rules of law, be presumed unpaid, while the writing remains in possession of the creditor, and no written document of extinction appears.

On the other hand, it was thought that the act was founded on the presumption, that debts due by open account are paid within three years after they are contracted, and was meant to oblige traders to enforce payment within a short time, or at least to procure such an acknowledgement of the debt in writing, as will prove, not merely the constitution, but the subsistence of it. Now, in the present case, (it was observed), the furnishing is proved *scripto*, but there is nothing to take off the presumption of payment, as neither the written order, nor the carrier's receipt made any substantial difference upon the nature of the debt, which continued to be due by open account.

The Lords (22d November 1793) repelled the defence of prescription. But on advising a reclaiming petition and answers, they (11th February 1794) sustained it; and this judgment being brought under review by a reclaiming petition with answers, they "adhered."

Lord Ordinary, *Henderland*. A.G. *John Dickson*. Alt. *Ja. Ferguson junior, Cranston*.
Clerk, *Gordon*.

D. D.

N^o CXXXI.

November 18. 1794.

FRANCIS SADDLER and his Attorney,

A G A I N S T

MURDOCH MACLEAN.

PREScription.—1579, c. 83.—*An action founded upon a mandate is not affected by the triennial prescription.*

IN 1774, Francis Saddler, merchant in Liverpool, at the desire of Archibald Maclean of Lochbuy, employed various tradesmen to build and rig out a pleasure-boat, which he afterwards sent to him in Scotland.

Saddler paid the bills of the different tradesmen, and, in 1791, brought an action for the sums he had advanced, with interest, (but without charging commission) against Maclean's representative, who, in defence

Pleaded: The debt claimed being for articles provided by a merchant, falls under the triennial prescription, established by 1579, c. 83. "as a merchant's compte;" and even should it not be considered as falling immediately under that description, yet as it is an account of which the pursuer had right to expect immediate payment, and as the prescription in question is founded on the presumption, that such debts will be paid within three years, or a written acknowledgment granted for them, it comes under the general words in the statute, "of other sicklike debts;" Dict. *voce* Prescription, vol. ii. p. 119. 121.; Fac. Coll. 15th February 1791, Forsyth against Simpson.

Answered: The debt sued for is due to the pursuer, not as a merchant, but as a *mandatarius*, and is totally different in its nature from those mentioned in the act 1579. In the case of a merchant's account, the obligation of the debtor is for the price of articles sold to him by the creditor, and it is only obligations of a similar nature which can fall under the general description of "other like debts." If the operation of the statute were extended to a mandatary's claim for indemnification, there is no debt not constituted by writing, which would not by parity of reason be subjected to this prescription, and thus most of the other short prescriptions would become nugatory, although established by express statutes; Kilkerran, p. 418. 1740, Drummond against Stewart; Fac. Coll. 13th June 1781, Butchart against Mudie and Rainy.

The Lord Ordinary sustained the defence of the triennial prescription.

simply in terms of the libel, so that the accumulating the debts separately in the grand decerniture and abbreviate was merely the operation of the extractor.

Farther, supposing the adjudication had been properly articulate, the Legislature makes no distinction betwixt such and other adjudications. General adjudications when defective in any particular, have in no instance been supported, farther than as a security; Stair, b. 3. tit. 2. § 30.; Bankton, b. 3. tit. 2. § 59.; Ersk. b. 2. tit. 12. § 35.; Dict. vol. i. p. 7.—9.; Stair, 20th July 1678, Morise against Orrock; Harc. p. 68. *voce* Comprising, March 1683, Baillie against Gairner; Kilk. Adjudication, 1st December 1738, Creditors of Catrine against Baird; 6th November 1739, Montgomery against the Creditors of Cunninghame; 16th December 1760, Creditors of Brown against Gordon; 28th November 1783, Heir of Porteous against Nasmith.

The opposite doctrine would be adverse to the object of the act 1672, c. 19. which was to prevent estates from being carried off at an undervalue, as it would be an easy matter for the creditor to split his debt into a number of distinct accumulated sums, in which case there would be little chance that one of them at least should not be accurately calculated in the adjudication. The doctrine of the defenders would likewise involve this singular consequence, that where a valuable estate was adjudged in the same summons for two separate debts, the one of them trifling, and the other considerable, and there was a *pluris petitio* on the latter, the property of the estate might be carried away for the former, while a personal claim for the large debt would still remain against the debtor.

The Lord Ordinary reported the cause on informations.

The Court, by the narrowest majority (17th May 1793) repelled the reasons of reduction.

Upon advising a reclaiming petition, with answers, replies and duplies, a hearing in presence was appointed; after which the Lords (7th March 1794) before answer, ordered memorials on the point, "how far the alleged *pluris petitio* on one or two of the articles adjudged for, has the effect to open the decret of declarator?"

Upon advising the memorials, the Court, with only one dissenting voice, were of opinion, That the adjudication in question was not articulate, and that therefore parties in consequence of the overcharge must enter into a count and reckoning in the same manner as if no process of declarator had been brought. It is essential to an articulate adjudication, (it was observed) that the debts should be separately accumulated by the act of the Judge. As in the present case there was an alternative conclusion in the libel, and as the pursuer did not make his election at the bar, the separate accumulation which afterwards took place is to be considered

dered merely as the act of the extractor, and cannot affect the question.

The Court had therefore no occasion to determine what would have been the effect of the adjudication, if it had been articulate; at the same time, it did not appear quite clear, that even in that case the judgment would have been different. On the one hand, it was observed, that in articulate adjudications, a *pluris petitio* on one article no more affects the rest than if a separate summons had been brought for it. On the other, a doubt was expressed, how far there was any difference between articulate and other adjudications, at least in questions concerning the expiry of the legal.

The Lords “ found, That the adjudication in question is not “ an articulate adjudication, and proceeds on a *pluris petitio*; “ therefore, the Lords repelled the defence founded on the de- “ creet of expiry of the legal : Found, That said adjudication can “ only be sustained as a security for the principal sums truly due “ and interest thereon : Found, That it is unnecessary at present “ to determine any other points of law in the cause ;” and re- mitted to the Lord Ordinary to proceed accordingly.

Lord Ordinary, Monboddo. Aft. Solicitor-General Blair, Geo. Fergusson, McCormack, Fletcher. Alt. Dean of Faculty Erskine, Tait. Clerk, Sinclair.

D. D.

N° CXXXIII.

November 26. 1794—

HORATIUS CANNAN, Common Agent in the Rank—ing
of Polquhairn,

AG A I N S T

JOHN GREIG, Trustee for Alexander Crawford.

PROCESS.—*The Court can dispense with the second diet in a summons of constitution on the passive titles, where the pursuer restricts his demand to a decree cognitionis causa.*

PROVISION TO HEIRS AND CHILDREN.—*Where a wife in a postnuptial contract of marriage disposes lands to her husband in liferent, and to the heirs of the marriage in fee, but with power to the father to sell, or burden them upon condition of his granting security for a certain provision payable at his death to the heir ; such provision is good in competition with the onerous creditors of the father.*

BY a postnuptial contract of marriage between the late Adam Crawford Newall and Marion Cunningham, co-heiress of the estate of Polquhairn, Mr Crawford settled certain provisions on the
the

Mr Crawford, for the said L. 2000. The common agent objected to his interest, 1st, That the Court had no power to dispense with the second diet of the summons of constitution, and that consequently the decree in that action, and of adjudication which followed upon it, were inept*. 2^{dly}, That being a provision to a child, not payable till after the father's death, it was not good against onerous creditors.

Mr Greig, in defence against the first objection

Pleaded: Prior to the act 1693, c. 12. two separate citations were required, where the pursuer meant to instruct his libel by witnesses, or a reference to oath. A second diet, however, was at no period necessary, where the libel was to be verified by writing; Hope, tit. 1. § 4.; Stair, b. 4. tit. 38. § 30. Now, as the claimant's libel is grounded on the contract of marriage, and the extracted decree of declarator, and as Alexander Crawford's written renunciation to be heir was likewise produced when the decree of cognition was obtained, the Court merely dispensed with a step of procedure, which was in fact unnecessary.

Answered: The rule, that summonses may proceed on one diet, only applies where the claim is completely fixed on the defender by writing; but a charge to enter heir has not this effect. The very ground of the summons implies an alternative to the defender, either to be liable or not, as he chuses, he is therefore entitled to the fullest notice, in order that he may have time to deliberate; and by his renouncing, the pursuer in this case has completely failed in verifying his libel by writing. What he there concluded for was, that the heir should be found personally liable, whereas, what he obtained was a decree *cognitionis causa*, which, so far from being founded on any written evidence referred to in the libel, proceeded on the renunciation, which did not exist till the action came into Court; see Fountainhall, 17th July 1702, Biggar against Wallaces, abridged in Dict. vol. i. p. 465.

Replied: Were the pursuer to insist on a decree against the heir, personally, a second diet would no doubt be necessary, but not where he limits his demand to a decree of cognition, because in this last case he needs to bring no proof of the passive titles. All that is required of him is to verify the debt, by producing the writings by which it is constituted.

Besides, as the *induciæ* are introduced solely for the benefit of the defender, he is not obliged to wait their expiration. As Alexander Crawford might have sifted himself in Court, as soon as a summons was raised against him, *a fortiori*, was he entitled to appear and renounce after the lapse of the first diet.

Objected

* The Court on the application of Mr Greig, had also allowed the decree of constitution to be extracted before it was read in the minute book. The common agent likewise objected to his interest on that account. But this point having occurred in a question with another creditor in the same ranking, where it was more fully discussed, (See Cannan against Corrie, 24th February 1795), it is unnecessary to take further notice of it here.

Observed on the Bench: The Court did right in dispensing with the second diet, as here both the debt and the renunciation of the heir were instructed *scripto*. In actions on the passive titles, however, where either the debt is not instructed by writing, or where the pursuer means to insist against the heir, personally, such dispensation would be incompetent. Neither would a defender, in cases where there is a competition among creditors, be allowed to appear, until both diets of citation had run, because it would put it in his power to give an improper preference to one creditor over another.

The Court unanimously repelled the objection.

Mr Greig, against the second objection,

Pleaded: The granting the provision claimed was the express condition on which the father obtained from his wife the power of selling her estate, or burdening it with debt. The creditors are therefore not entitled to oppose its being fulfilled. Nor can it derogate from the son's right, as creditor to his father, that his sum was not to be paid till his father's death; for as by the contract the latter was to have the liferent of the lands, it followed, that he should have the liferent of the sum which was reserved to the son out of them, in case he should be deprived of the fee.

Answered: The substantial fee of the lands was by the marriage-contract given to the husband, both in consequence of the power which it gave him of selling and burdening the lands, and of the discharge of the trust then in his person. The sole reason of disposing them to the son and the other heirs mentioned in the contract, in fee, was to save the expence of making up titles, in the event of their succeeding to them on the husband's death. Although, therefore, the estate came by the mother, it was the father and his representatives who became bound for the L. 2000. Nor was this provision more onerous than other provisions in marriage-contracts; the estate was conveyed to the husband *nomine dotis*, and was the consideration for this and all the other obligations he undertook. The contract created no real burden on the estate in favour of the son, nor consequently any imitation of the father's right under it; the obligation in favour of the son was therefore personal; and, like other obligations in marriage-contracts, not exigible, till after the father's death, ineffectual in a competition with creditors; Erskine, b. 3. tit. 8. § 38.; Fac. Coll. 1st July 1754, Creditors of Strachan against Strachan.

The Lords unanimously repelled the objection.

A reclaiming petition, praying that both objections should be sustained, was refused, 16th December 1794, without answers.

Lord Ordinary, *Dunfinnan*.
Alt. Rolland, *J. W. Murray*.

For the Common Agent, *Geo. Fergusson, M. Ross*.
Clerk, *Pringle*.

R. D.

N° CXXXIII.

November 27. 1794.

JEAN MACDONALD,

AGAINST

ALEXANDER LAING.

SUCCESSION.—*The succession of a Scotsman who had resided many years in the West Indies, where he had acquired a valuable plantation, but who had returned to his native country for the recovery of his health, and died there, found to be regulated by the law of Scotland, although a proof was offered that he meant to have returned to the West Indies if his health had permitted.*

WILLIAM MACDONALD, a native of Scotland, acquired a considerable plantation in Jamaica, where he had resided about fifteen years. In 1779, he was appointed lieutenant in the 79th regiment of foot, at that time quartered in the Island; he also got the command of a fort in it. In 1783, he obtained leave of absence for a year, that he might return to Scotland for the recovery of his health. He died a few months after his arrival. The 79th regiment was by this time reduced. He had no effects in Scotland, and his only property in England were two bills which he had transmitted from Jamaica before he left it, in order, as was said, to purchase various articles for his plantation.

His father intromitted with the funds in England.

Jean Macdonald, and other sisters of the deceased, brought an action against him to account for their brother's executry. The defender died during the dependence of this action, leaving his grandson, Alexander Laing, his heir, as to the succession of his son. The rights of the parties turned upon the question, Whether William Macdonald had his domicil in Jamaica or in Scotland. Laing offered to prove, that the deceased meant to have returned to Jamaica, if his health had permitted, and that he had no intention of residing in this country. And

Pleaded: Moveable succession is regulated by the law of the country, where the deceased resided *animo remanendi*. To which country this description belongs, is to be ascertained not merely by the place of his birth, or of his death, but by the whole circumstances in his situation; see case of Bruce against Bruce, in House of Lords, 15th April 1790. Upon this principle, William Macdonald had his domicil in Jamaica.

The Lord Ordinary found, the succession was to be regulated by the law of Scotland, in respect that William Macdonald died

ed in Scotland his native country, where he had resided several months before his death.

A reclaiming petition having been presented, the Court were of opinion, that the domicil of William Macdonald was in Scotland, and that the proof offered was incompetent, and therefore unanimously “ refused ” the petition without answers.

A second reclaiming petition, along with which were produced two letters of the deceased, as shewing his intention to return to Jamaica upon the recovery of his health, was appointed to be answered. Upon advising which, some of the Judges came to be of opinion, that the domicil of the deceased was in Jamaica. A considerable majority, however, remained of their former sentiments.

The Court “ adhered.”

Lord Ordinary, *Dunfinnan.*
Clerk, *Colquhoun.*

For the Petitioner, *Jo. Burnet.*

Alt. *Tho. Wilson.*

D. D.

1° CXXXIV.

November 28. 1794.

GEORGE BROWN,

A G A I N S T

ALEXANDER CAMPBELL.

WRIT.—*An informal missive, importing a cautionary-obligation, found effectual, where the subscription was acknowledged by the granter, and the other party had acted on the faith of it.*

THOMAS BROWN having agreed to become cautioner in a suspension for John and Daniel Scots, they, along with Alexander Campbell, granted the following missive :

“ *Pertb, 15th May 1769.*

“ As you are to sign cautioner in a bill of suspension, &c. we hereby bind ourselves, conjunctly and severally, to free and relieve you of all cost, skaith and damage, you may sustain by signing the bond of cautionry. And we are, &c.”

This

This obligation was not holograph of Campbell, nor were the solemnities required by the act 1681 observed in its execution; but in consequence of it, Thomas Brown signed the bond of caution the day following.

The letters having been found orderly proceeded, and the debt recovered from Thomas Brown, George, his representative, afterwards brought an action of relief against Alexander Campbell, who admitted his subscription, but in defence

Pleaded: As the missive infers a cautionary-obligation, it is null, as wanting the statutable solemnities; Fount. 11th Januar 1711, Gordon against Mackintosh; Edgar, 4th February 1725, Campbells against Campbell. Nor can this objection be obviated by the defender's acknowledging his subscription; Wallace, 21st July 1772, Crichton and Dow against Syme; Fac. Coll. 25th November 1782, Wallace against Wallace; 23d June 1786, Sir A. Edmonstone against Lang; 22d May 1790, Macfarlane against Grieve.

Answered: Although a cautionary-engagement cannot be established by witnesses, yet it is not a *literarum obligatio*, which requires writing as an indispensable solemnity; 21st July 1772, Crichton and Dow against Syme. Like the contract of loan, it may be proved by the oath or acknowledgment of party; and as in the present case the defender neither disputes his subscription, nor the import of the missive, he consequently admits the obligation.

Besides, as Thomas Brown subscribed the bond of caution on the faith of the missive, and has since paid the debt, a *rei interventus* has taken place, which must exclude every objection to its formality; Fac. Coll. 5th December 1765, Henderson and Cowan against Murray.

The Lord Ordinary assilzied the defender.

But, on advising a reclaiming petition and answers, the Court were unanimously of opinion, that the interlocutor should be altered. Some of the Judges went upon the ground first stated for the pursuer. Others seemed to be of opinion, that, *rebus integris*, an informal cautionary-obligation was not binding; but that in all cases where, as here, there had been a *rei interventus*, the *locus pœnitentiæ* was barred, and that the case of Sir Archibald Edmonstone against Lang, founded on by the defender, had been erroneously decided.

The Lords unanimously decerned against the defender, and found him liable in expences.

Lord Ordinary, *Abercromby*.

Aft. *Craigie*.

Alt. *W. Erskine*.

A similar judgment was pronounced, 3d February 1796, Sinclair against Sinclair.

R. D.

N^o CXXXV.

November 29. 1794.

DAVID WHITE,

AGAINST

DAVID BAILLIE.

PERICULUM.—*A farmer found not entitled to deduct any part of the wages of a servant hired for a year, on account of his having been disabled by sickness from working during eleven weeks of that period.*

DAVID BAILLIE, a farmer in the county of Forfar, having hired David White, as his servant, for a year, the latter, after entering into his service, was seized with an illness, which prevented him from working during eleven weeks. No other servant, however, was hired to do his work during his absence.

White having afterwards brought an action against Baillie, for payment of his wages, the defender claimed a deduction, in proportion to the period of the pursuer's absence.

The Sheriff gave judgment in favour of the pursuer.

A bill of suspension having been passed, the suspender offered to prove, that it was the practice of the county where he lived, to make such deduction, and farther

Pleaded: As in the contract of location, the premium paid by the *conductor* is meant to be proportioned to the benefit received by him, it is reasonable, that when any unforeseen accident deprives him of the expected advantage, he should be allowed an equivalent abatement. This principle is recognised where the subject of the contract is a farm or a house; *Dict. voce Periculum*, vol. ii, iii.; and it should hold more particularly in the contract between master and servant, as there the amount of the deduction can be more easily ascertained; and although, from motives of humanity to the latter, every short period of absence would not be taken into account, yet where the inability to work has been so long continued as in the present case, the defence ought to be sustained. Accordingly, at an appeal heard at the Perth circuit, within these few years, it was found, that a master was entitled to make a deduction where the servant had been absent on account of sickness a quarter of a year.

Answered: Wherever a person pays a determinate premium for the use of a subject, he takes on himself the risk of the quantity of benefit to be received from it. Upon this principle, in the

case of a farm, although the tenant is not obliged to pay any rent, where, from circumstances not imputable to him, no crop at all is produced, he has no claim for abatement, merely because the farm has been less productive than usual. The same should hold still more in questions between master and servant, as the duty of the latter consists not so much in performing any specific quantity of work, as in a general respect and submission to the former, and attention to his interest; which lay him under a corresponding obligation to take care of his servant, when in bad health; Stair, b. 1. tit. 15. § 1, 2.; Bankton, b. 1. tit. 20. § 19.; Erskine, b. 3. tit. 3. § 16.; see also, l. 38. ff. *loc. cond.*

The Lord Ordinary found the letters orderly proceeded.

Upon advising a reclaiming petition, with answers, one Judge doubted the propriety of the interlocutor, and others wished to have the practice and understanding of farmers ascertained; but it was the prevailing opinion of the Court, that, without laying down any general rule on the subject, the circumstances of the case sufficiently warranted the interlocutor which had been pronounced. In England, (it was believed,) no abatement would be allowed in a case like the present; and it was thought a strong circumstance, that the suspender did not find it necessary to hire another servant in the charger's place, during his illness.

The Lords "adhered."

Lord Ordinary, *Dregburn*,
Alt. *Robertson Scott*.

For the Suspenders, *Jo. Millar jun. Monypenny*.
Clerk, *Home*.

D. D.

N^o CXXXVI.

December 2. 1794.

JAMES YORKSTOUN and others,

AGAINST

MARY GRIEVE.

WRIT.—*In the case of a deed executed by a person who can neither nor write, it is not necessary as a statutable solemnity, that the d of the notaries should bear, that it was read to the granter in sence of the witnesses.*

ON the death of Jane Ferguson, who could neither read nor write, two settlements were found in her possession, in favour of Mary Grieve, dated in 1783, the other dated in

in favour of James Yorkstoun and others. The doquet to the first bore, that she gave the usual authority to the notaries to subscribe it for her, "touching our pen in presence of the said witnesses, the deed having been first read over to the said Jane Ferguson." The doquet to the last was in these words: "At the desire of the above named Jane Ferguson, who declared she could not write, I James Gibson, notary-public, and notary in the premisses, have subscribed the same for her, she having delivered the pen to me, for that effect, before the above named witnesses, and of the said date."

It was *objected* for Mary Grieve, That the posterior settlement was void, in respect the doquet did not bear, that it was read over to the granter before the witnesses; which, it was contended, was not only indispensable in common sense, because otherwise it was impossible to know, whether it was really the deed the granter meant to execute; but was also, in fact, on a fair construction of the statutes 1540, c. 117.; 1579, c. 80.; 1681, c. 5. an essential statutable solemnity.

Both these propositions were controverted by James Yorkstoun, and the other legatees.

The arguments used on both sides were the same in substance with those stated in the report of the case of the Trustees of Ross against Aglianby; Fac. Coll. 3d July 1792.

The question came before the Court in an action of multipointing, brought by a debtor of the testatrix.

The Lord Ordinary pronounced the following interlocutor: "In regard that the doquet of the notary annexed to the last settlement executed by Jane Ferguson, does not bear, that the said settlement was read over to the said Jane Ferguson, in presence of the witnesses subscribing, finds, That the said testament, as wanting that solemnity, cannot be sustained as a written testament; but finds, That if it can be established by parole testimony, that the said settlement, notwithstanding of this omission in the doquet, was actually read over to said Jane Ferguson before the witnesses, that then it may be sustained as a verbal testament, to the amount of L. 100 Scots; and allows James Yorkstoun and others to prove, that it was read over, and that the testator approved of the same, and allows the defender a conjunct probation thereanent."

But, on advising a reclaiming petition for Yorkstoun and others, with answers, it was

Observed on the Bench: The reading the deed of a person who is blind, or who can neither read nor write, in presence of the granter and witnesses, is not a solemnity required by statute to be mentioned in the doquet; but it may be often necessary, that such reading should take place as a precaution against fraud, and that the witnesses may be able to establish the fact, if called upon so to do.

The

The Court unanimously “repelled the objection in point of form to the notary’s docket to the last will and testament in favour of the petitioners.”

Lord Ordinary, *Monboddo*.
Clerk, *Pringle*.

A&C. *R. Hamilton*.

Alt. *D. Casbcart*.

R. D.

N° CXXXVII.

December 3. 1794.

WILLIAM GORDON,

AGAINST

JOHN and HUGH MACFARLANES.

WITNESS.—*A witness is not entitled to charge more for his travelling expences, than what is allowed by the act of federunt, 21st December 1765.*

WILLIAM GORDON, writer in Dumfries, having been cited by John and Hugh Macfarlanes, to appear at Edinburgh as a witness, came to town in the ordinary stage-coach; he was detained two days there in order to be examined, and returned the fourth from his departure, by the same conveyance.

He afterwards claimed L. 4, 12 s. as the actual expence of the journey, exclusive of any charge for trouble and loss of time.

The Macfarlanes refused to give him more than 12 s. 4 d. in terms of the act of federunt, 21st December 1765, which allows a witness 1 s. 2 d. for each day he is detained at the place where he is to give his evidence, and, provided he travel on horseback, 2 s. 6 d. for each day he is on the road; contending, that in the present case, Gordon might have come to town on horseback in two days, and returned in the same time. They farther

Pleaded: It was the object of the act of federunt to make a general rule applicable to all cases, and however inadequate the indemnification it affords, no more can be exacted while the act remains unaltered. To allow a witness the actual sum expended by him, would not only often be hard on poor litigants, but, as the sum to be given would vary in each case, would be the source of constant disputes.

Answered: As every individual in the community is interested in the punishment of crimes, there might be some reason for maintaining, that a witness in a criminal cause should pay his own expences; even in that case, however, the public prosecutor is accustomed to give a sum for indemnification, suited to the circumstances of the case. But as the benefit arising from the evidence of a witness in a civil cause is wholly confined to the individual litigants, the party by whom he is cited ought to pay his full expences: Indeed, if witnesses are not indemnified, it would be an easy mode of gratifying malice against a person living at distance, to cite him in that capacity; and there would besides be danger of a bias in his deposition, if his only chance for indemnification depended on the good will of the person by whom he was adduced. As therefore the sum allowed by the act of sederunt is, from the change of circumstances, totally inadequate for the purposes for which it was intended, the act ought not to be, and in practice never is, enforced.

The Lord Ordinary found, That Mr Gordon was not legally entitled to demand more than what was allowed by the act of sederunt 1765.

Upon advising a reclaiming petition for Mr Gordon, with answers, the Court, though they considered the allowance fixed by the act of sederunt to be too low, were of opinion that effect must be given to it, until it be altered; but sensible of the hardship of the case, they thought that the act ought to be liberally construed as to the time allowed for travelling.

The Lords therefore found the "petitioner entitled to fourteen days travelling-charges, besides the two days he was detained in Edinburgh, which, at the rate of 2 s. 6 d. Sterling for each travelling day, and at the rate of 1 s. 2 d. Sterling for each of the two days he was detained in Edinburgh, amount to the sum of L. 1 : 17 : 4 Sterling; found the respondents liable to the petitioner in that sum, and of L. 5 Sterling of expences of process, and the full expences of extract."

Lord Ordinary, *Abercromby*.
Clerk, *Pringle*

For Gordon, *D. Catbcart*.

Alt. Turnbull.

D. D.

N^o CXXXVIII.

December 3. 1794.

Mrs RAE CRAWFURD,

AGAINST

Sir JOHN STEWART and Mrs STIRLING.

COLLATION.—An heir of entail who is one of the nearest in kin, and not the heir alioqui successurus, is entitled to a share of the moveable succession without collating.

FRANCIS STEWART CRAWFURD died intestate and a bachelor.

Sir John Stewart, his only brother, was his heir-at-law, and his two sisters Mrs Rae Crawford and Mrs Stirling his executors.

The property of Mr Crawford at his death, consisted, *1st*, Of some heritage of little value descendible to the heir of line; *2^{dly}*, Of Milton, an estate of considerable value which he held under a strict entail, and to which his eldest sister Mrs Rae Crawford succeeded as nearest substitute; *3^{dly}*, Of arrears of rent and other moveables, worth above L. 1200 Sterling.

Sir John Stewart having found it for his interest to collate, he and his youngest sister Mrs Stirling, claimed the whole unentailed succession, to the exclusion of Mrs Rae Crawford, unless she would collate the estate of Milton, while she, on the other hand, contended, that this was rendered impracticable by the entail, but that she was nevertheless entitled to a share of the moveable succession, as one of the nearest in kin.

In order to try the question, a multiple-poining was brought, in name of the tenants, and others, who held moveable funds belonging to Mr Crawford, in their hands; and in support of the claim of Mrs Rae Crawford, it was

Pleaded: *1st*, The law of collation applies only to the heir of line, and not to heirs of entail, or of provision; Balfour's Practics, p. 233.; Stair, b. 3. tit. 8. § 48.; Dirleton, *voce* Heirs of tailzie; Macdowall, vol. ii. p. 385.; Erskine, b. 3. tit. 9. § 3.; Kames, 19th November 1720, Riccart against Riccart. Indeed, if the latter were bound to collate, a double collation would frequently take place; a thing never supposed by our lawyers, who speak of the privilege of the *heir* in this case, thereby meaning the heir of line, in contradistinction to successors by tailzie and provision, who, in comparison with him, are considered as strangers; Craig, lib. 2. *dieg.* 17. § 19.; Dirleton, *voce* Heirs of tailzie; Stair, b. 3. tit. 5. § 8.

Collation

• Collation is a privilege competent to the heir-at-law, whereby the general rule excluding him from the whole intestate moveable succession, is limited, and himself admitted to a share, upon his collating the heritage and heirship-moveables. As, however, it is only to a share of the moveable *intestate* succession to which he is admitted, there is no reason why he should contribute the heritage he takes by deed. To be admitted to the legal succession of one kind, it is enough that he renounces the legal succession of another.

2dly, The limitations in the entail render it impossible for Mrs Rae Crawford to collate; and it would be repugnant to the idea of collation that she should on that account be excluded, as it always supposes an option in the heir to use his privilege or not, as he shall think best. Such exclusion would also be attended with obvious injustice, wherever the entailed property was of small value, in proportion to the moveable succession.

Answered: In all cases where the law either grants any privilege to heirs, or imposes any obligation on them, heirs of provision, if not specially excepted, are understood to be precisely *in pari casu* with the heir of line. As to collation in particular, there is no reason why the former should be more favoured than the latter; for although a person may chuse to regulate his succession by settlements, it does not follow, that he means in other respects to dispense with the reciprocal obligations thence arising in the ordinary course of law between heir and executor; Macdowall, b. 3. tit. 8. § 100.; Fac. Coll. 15th November 1787, Balfour and others against Scott.

2dly, If it be impossible for an heir of entail to collate, it must be equally impossible for him to take any share of the moveables; for no person can claim a privilege, without fulfilling the condition on which it is granted. But it is a mistake to suppose, that heirs, under the strictest entail, cannot collate; they may at least collate the rents and profits of the estate during their lives, and even the estimated value of the fee.

The Lord Ordinary, “in respect that Mrs Rae Crawford was not heir of line, but only heir of provision in a particular estate, which she takes under a deed of entail, found that she is entitled to take a share of the executry along with her brother and sister, without collating the tailzied estate.”

On advising a reclaiming petition, and answers, it was

Observed on the Bench: Mrs Rae Crawford is a stranger to her brother's heritable succession, being neither his heir-at-law, nor taking any thing under any deed of his, and therefore the law of collation cannot in any shape apply to her; she succeeds to the estate of Milton under a strict entail, executed by their common ancestor, and not as representing her deceased brother, who

who himself was only an heir of entail: And it is no reason for excluding her from a share of his moveables, that she takes an estate to which, in consequence of the destination of the tailzie, he was a prior substitute to her.

The Court, with only one dissenting voice, "adhered."

Lord Ordinary, *Justice-Clerk.* For Mrs Rae Crawford, *M. Resp.* *Alt. C. Hope.*
Clerk, *Homs.*

R. D.

N^o CXXXIX.

December 5. 1794.

ROBERT WATSON,

AGAINST

ALEXANDER MACDONELL.

ARRESTMENT.—HERITABLE and MOVEABLE.—*A debt secured by an assignation to a lease of an heritable subject, followed with possession, cannot be carried by arrestment.*

WILLIAM MACDONALD assigned a lease of an heritable subject to James Macdonald, in security of certain personal debts. The subject was in possession of subtenants, from whom the assignee drew the rents. The assignation was intimated to the landlord.

Robert Watson, creditor of James, executed an arrestment in the hands of William Macdonald, and afterwards raised a process of forthcoming against him, in which appearance was made for Alexander Macdonell, trustee on the estate of James, which had been sequestrated after the date of the arrestment.

William Macdonald likewise raised a multiple-poining.

Alexander Macdonell

Pleaded: The debts were made real, by the assignation, and consequently became the subject of adjudication, not of arrestment. The possession on the lease being equivalent to infeftment, it prevented the application of the exception contained in the act 1661, c. 51. which declares, that money due "by bonds, contracts,

N° CXL.

December 9. 1794.

WILLIAM CURTIS and others, Assignees under the Commission of Bankruptcy of Gibson and Johnson,

A G A I N S T

EDWARD CHIPPENDALE, Trustee on the sequestrated Estate of William Macalpine and Company.

COMPENSATION.—RETENTION.—*If the creditors of A, a bankrupt, claim on the bankrupt-estate of B, for the amount of certain bills accepted by him, in A's possession at his bankruptcy, is it competent for the creditors of B to plead retention against this claim, on account of B's having indorsed bills accepted by A, the holders of which last have drawn a dividend out of the estate of A, and are likewise claiming upon the estate of B?*

WILLIAM MACALPINE and Company, Livesay, Hargrave and Company, and Lewis and Potter, agreed, that an exchange of bills should take place among them, with a view to support each other's credit.

Bills accordingly were delivered to Livesay, Hargrave and Company, and Lewis and Potter, by Macalpine and Company, to a very large amount, drawn by them, and accepted, partly by other houses with whom they were connected, and partly by Barr and Maddox, a fictitious firm assumed by themselves.

Many of the bills thus obtained, were indorsed by Livesay and Company, and Lewis and Potter, to their bankers Gibson and Johnson, in security of advances which they had made for them.

On the other hand, Macalpine and Company received bills to a large amount from Livesay and Company, and Lewis and Potter, which were drawn by them, chiefly on their own agents, and accepted by Gibson and Johnson.

In May 1788, Macalpine and Company, Livesay, Hargrave and Company, Lewis and Potter, and Gibson and Johnson, became bankrupt.

Bills accepted, drawn, or indorsed, by Macalpine and Company, to the extent of L. 25,801 : 4 : 10, were then in the hands of Gibson and Johnson.

The assignees under the commission of bankruptcy awarded against them, entered a claim for this sum, upon the sequestrated estate of Macalpine and Company.

The trustee *objected* to the claim, That bills accepted by Gibson and Johnson, to the amount of L. 22,513 : 14 : 5, had been put into the hands of Macalpine and Company, which they had indorsed,

indorsed, and which not having been retired by the accepters, were now ranked on the estate of Macalpine and Company, and that therefore, their amount fell to be deducted from the claim of Gibson and Johnson, who could only rank for the balance, being L. 3287 : 10 : 5.

It appeared that the holders of the bills accepted by Gibson and Johnson had likewise claimed on their estate, and had drawn a dividend of 5 s. 8 d. in the pound. The estate of Macalpine and Company had at this time paid nothing, but it was stated as pretty clear, that it would afford their creditors a dividend of 2 s. 6 d. in the pound.

So matters stood when the question came before the Court, when, in support of the objection, it was

Pleaded: No person can demand payment or performance from another, till he have answered any claim which that other has against him. Hence, although Macalpine and Company are not in the possession of the bills accepted by Gibson and Johnson, yet being, in consequence of their indorsing them, liable for their payment, they are entitled to retain what they owe to Gibson and Johnson for their relief. In order to found a right of retention, it is not necessary that the party pleading it, should hold a voucher of debt, of which he can instantly demand payment; it is enough that he can shew, that at some future period, he may be distressed for a debt for which his creditor is primarily liable. Thus a cautioner can plead retention against the principal debtor till relieved of his engagement; Stair, b. 1. tit. 18. § 7.; Macdowal, b. 1. tit. 24. § 34.; Erskine, b. 3. tit. 4. § 20.; Fount. 10th July 1711, Irvine against Menzies; Kames, 19th June 1744, Murray against Chalmers. Even compensation may in particular cases be pleaded, where the party founding on it, is not in the right of the debt; thus, a cautioner may plead it on a debt due to the principal debtor, Fount. 1st July 1709, Strachan against the Town of Aberdeen.

Answered: If Macalpine and Company had still been possessed of the bills of Gibson and Johnson, they would no doubt have been entitled to plead compensation against the present claim. But by indorsing them for value, they have transferred their right in them to the present holders, who accordingly have been ranked for them on Gibson and Johnson's estate, and drawn a considerable dividend.

If in this situation, Macalpine and Company were entitled to plead retention, it would produce the utmost inequality and embarrassment in the division of bankrupt-estates.

Bills being substitutes for cash, must necessarily pass through the hands of many indorsers, all of whom, if they happened to be debtors to the acceptor, would have a right of retention; and in this way sums might be withheld from the estate of the acceptor to ten, twenty, or thirty times the amount of the bills due by him.

Suppose

Suppose that a bill of L. 1000, of which A is acceptor, pass through ten different hands, all of whom owe him a L. 1000, and that afterwards they all become bankrupt, and pay only 2 s. in the pound; suppose also, the estate of A to be bankrupt, and that it likewise yields a dividend of 2 s. : If each of these indorsers were entitled to retain the dividend due on A's debt, the result would be, that A's bill of L. 1000 would be fully paid, while all his other creditors, equally onerous with those claiming under it, would draw a dividend of 2 s. only. Ten different parties would thus virtually rank on the same estate for the same debt, which would be contrary both to justice, and to the intention of the bankrupt-statutes, the great object of which is to effect a ratable distribution of the bankrupt's estate.

Even in the present case, as the holders of Gibson and Johnson's bills have drawn a dividend of 5 s. 8 d. in the pound from their estate, if the objector were to prevail, a further dividend would virtually be paid on them, corresponding to the dividend which Gibson and Johnson would otherwise be entitled to draw from the estate of Macalpine and Company, for the bills on which they now claim. And were this to turn out no more than 2 s. 6 d. still the bills of Gibson and Johnson indorsed by Macalpine and Company, would be drawing nearly a third more than their other debts, *i. e.* 8 s. 2 d. the others drawing only 5 s. 8 d.

Besides, Macalpine and Company, by indorsing the bills of Gibson and Johnson, came under an implied warrandice, that they would do nothing to the prejudice of their indorsee. But were they to prevail in this question, they would be guilty of a breach of it, by diminishing the funds divisible among Gibson and Johnson's creditors, of which their own indorsee will receive a proportional share.

It is also to be considered, that, on the principle pleaded by the objectors, retention would be competent not merely to the holder of the bill, but to every indorsee, against the drawer and preceding indorsers; and as a bill may circulate over all the trading world, the claims competent to the holders or posterior indorsee against prior indorsee, might be infinitely diversified; and the ranking of creditors thus rendered inextricable.

The municipal law of this country, with respect to retention, when applied to cautioners, cannot affect this case. As it arises from bills of exchange, and may therefore, as a precedent, affect the interest of strangers, it must be determined on those established principles of mercantile law, which, from views of expediency and justice, regulate the transactions of merchants in other trading countries; Mackenzie's Observations on 1681, c. 20. p. 466. In England, where these principles are better understood, from being more frequently resorted to, the identical point at issue has more than once occurred, and has been uniformly decided in favour of the claimants; 5th November 1792, Gibson and Johnson against Edensons Assignees, determined by the Commissioners for the custody of the

he Great Seal; King's-Bench, Term. Reports, vol. iv. No. 714. 13th June 1792, *Howis v. Wiggins*. Other reasons also concur in the law of that country being adopted in the decision of the present question. It was the *locus contractus*, the *locus solutioni destinatus*; it is of importance, that in mercantile questions there should be an uniformity in the law of the two countries, and no opposite judgment has yet been given in our own Courts, none of the decisions quoted by the other party having been pronounced between merchant and merchant; indeed, all of them at a period when there was little trade in this country.

Replied: The objector does not argue, that one document of debt can in any case draw more than full payment, but merely, that where the creditor of a bankrupt is debtor to him to an equal amount, he will be secured by the right of retention from suffering by his insolvency. The inequality and hardship figured by the claimant, therefore, is what must occur in every case of mutual debts, where either party becomes bankrupt. Let it be supposed, that A becomes bankrupt, indebted to B and C in L. 1000 each, and pays only 2 s. in the pound, and that B owes him nothing, but that C owes him L. 1000, the consequence will be, that C, by pleading compensation, will lose nothing, while B will only draw 2 s. in the pound. In like manner, if C were cautioner for A for L. 1000, he would, by pleading retention till relieved, be freed from any loss on A's bankruptcy. And on the very same principle, if C, being creditor in a bill for L. 1000 to A, indorse it for value, he is entitled to retain till relieved of his subsidiary obligation as indorser. Neither would more than full payment be drawn for A's bill, although it should pass through ten different hands, each of them his debtor. If the creditors of A found it for their interest, they might pay the whole contents of the bill to the holder, and thus at once put an end to all claims of retention by prior indorsee: And on the same principle, whenever the bill was fully paid out of A's estate, either by actual dividends, or by the operation of retention, each indorsee would be obliged to pay what he owed to the bankrupt. The plea of the other party seems to be, that whenever the principal debtor becomes bankrupt, all claims of retention, and in short all preferable securities, should cease, although it is only in cases of insolvency that they can be of any use.

Even if the law of England were evidence of the law-mercantile, which it is not, it could have no effect on the present question, as both are equally inapplicable. For although bills arise from commerce, and owe their validity to the common consent of nations, yet it is only with regard to their constitution and mode of transference, that the law-mercantile has place. But in whatever country a bill may have been granted or negotiated, the mode of recovering payment of it, and the pleas of retention or compensation competent on it, must be regulated by the law of the country where payment is demanded.

The Lord Ordinary took the cause to report on informations.

The Court " Found, That to the amount of the acceptances **due** by Gibson and Johnson, the plea of retention is **well founded**, and that till relief is given to that amount, the assignees under the commission of bankruptcy awarded against Gibson and Johnson, are not entitled to be ranked upon the sequestrated estate of Macalpine and Company; and, in so far sustained the objection in question."

On considering a reclaiming petition and answers, the Court being of opinion, that the case was attended with very great difficulty, a hearing in presence was ordered, and after that **memorials**.

When the cause came again to be advised, several of the Judges thought there were no *termini habiles* for retention. Although (it was observed) the exceptions of compensation and retention, while founded on principles of equality, are attended with beneficial effects to both parties in saving counter actions, and on that account entitled to the favour of the law; yet in this case retention ought not to be admitted, because, when the situation of the parties, and the effect of their transactions, are thoroughly considered, it will be found, that to sustain Macalpine and Company's plea of retention would be attended with great injustice to the creditors of Gibson and Johnson. If both parties had continued solvent, the question would have been of no importance, or even although one or both had become bankrupt, if both sets of bills had remained in their hands, the one set might have been fairly set off against the other, although the dividends had been unequal. But the case here is quite different; Gibson and Johnson have indeed kept the bills of Macalpine and Company in their own hands, but Macalpine and Company have indorsed the bills of Gibson and Johnson for value. Their indorsee, are entitled to rank on both estates, and have accordingly done so. From that of Gibson and Johnson they have drawn a dividend of 5s. 8d. They will likewise draw from that of Macalpine and Company a dividend of 2s. 6d. If these estates should afford no further dividends, the indorsee will draw only 8s. 2d. in the pound, but Macalpine and Company the indorsers, have already got a great deal more; for having indorsed the bills of Gibson and Johnson for *full value*, and only repaid 2s. 6d. they have gained 17s. 6d. in the pound by the transaction; while, on the other hand, those of Gibson and Johnson must at all events be losers by it. For the bills of Macalpine and Company, which still remain their hands, they had accepted bills which have drawn from their estates at the rate of 5s. 8d. in the pound, so that even should they be allowed to rank on the estate of Macalpine and Company, if it yield only 2s. 6d. they will still lose 3s. 2d. in the pound: the result therefore of the whole transaction

action is, that while the creditors of Gibson and Johnson are offers to this extent, the creditors of Macalpine and Company, even after paying a dividend of 2 s. 6 d. not only on their own acceptances, but also on those of Gibson and Johnson which they endorsed, will be gainers to the extent of 15 s. in the pound.

On the other hand, a majority of the Court still remained of opinion, that as Gibson and Johnson were claiming to be ranked in the effects of Scotch bankrupts situated in this country, their right must be determined by the law and practice of Scotland, in which no principle is better established, than that a person may plead retention, till the creditor claiming a debt of any sort from him relieve him of all obligations for which that creditor is primarily liable.

The Court “ adhered.”

Lord Ordinary, *Henderland*. For the Claimants, *Rolland, Geo. Fergusson, Ja. Grant*.
For the Objectors, *Dean of Faculty Erskine, Honyman, Gba. Ross*. Clerk, *Sinclair*.

N. B. The propriety of this decision was very much called in question in an after case, *Nairn against Cranston*, 1796.

R. D.

No. CXLI,

N^o CXLI.

December 9. 1794.

WILLIAM and JOHN HARRISONS,

A G A I N S T

EDWARD CHIPPENDALE, Trustee on the sequestrated Estate
of Macalpine and Company.

BILL of EXCHANGE.—*When the debtor in a bill becomes a bankrupt, and a claim is made for it on his estate before the term of payment, the want of due negotiation cannot be objected by his creditors.*

When a bill has passed through the hands of a person who is neither drawer, acceptor, nor indorser of it, no recourse lies against him, if it be afterwards dishonoured.

WILLIAM and JOHN HARRISONS and Macalpine and Company had been accustomed to accommodate each other, by a mutual exchange of bills.

The latter became bankrupt in May 1788, and at that time bills to a large amount were in the circle, accepted by the Harrisons, and which they were afterwards obliged to discharge.

The Harrisons had in their possession, at the time of the failure, bills to the same amount delivered to them by Macalpine and Company, by whom some of them were drawn, but others were neither drawn, accepted, nor indorsed by them. The debtors in all these bills had become bankrupt, and claims had been lodged on their estates before the terms of payment.

The Harrisons entered a claim on these bills, on the sequestrated estate of Macalpine and Company, and produced, in support of it, on the one hand, the bills they themselves had accepted, retired; and, on the other, the bills they had got from Macalpine and Company, dishonoured, an account-current attested by Macalpine, after his bankruptcy, and a copy of certain proceedings in the Court of Chancery, relating to these bills, in consequence of a claim entered for them on the English estates of the bankrupts. They also referred to the mutual books of the parties.

The trustee on Macalpine and Company's estate

Objected: 1^{mo}, The claim, in so far as it is founded upon the bills drawn by Macalpine and Company, cannot be supported, because they have not been duly negotiated.

2^{do}, It is equally groundless, in so far as it proceeds on the remaining bills. He who discounts a bill trusts solely to the credit
of

of those whose names are upon it ; and when the person receiving the money for the bill does not indorse it, this can only have happened from the discounters not requiring his credit, and his wishing to keep himself free of the obligation of recourse ; but independently of the bills, there has been no legal evidence of the debt produced. Indeed, the nature of the transaction, which was a mere exchange of paper, does not admit of any separate claim, any more than if it had consisted in an exchange of goods, which might vary in their value, according to circumstances.

Answered : 1mo, It is a settled point in the law of England, where the bills in question were payable, that when the debtors in a bill become bankrupt, and claims are entered on their estates before the term of payment, negotiation is unnecessary ; 21st January 1792, Creditors of Macalpine and Company against Parsons and Govett.

2do, Supposing no claim to lie on the bills themselves, as they were delivered in security merely, and not in extinction of the debt due to the claimants, it is competent to prove its amount *aliunde*, and sufficient evidence has already been produced.

The Lord Ordinary reported the cause on informations.

The Court considered the first point to be completely settled in favour of the claimants, by the case of Parsons ; and that as to the second, although upon the general grounds stated for the trustee, no claim lay on the bills, the debt might be proved *aliunde*.

The Lords repelled the first objection, and as to the second, moved by what was said as to a separate proof of the debt, they remitted to the Lord Ordinary to hear parties farther.

Lord Ordinary, *Henderland*. A&C. *John Clerk*. Alt. *Honyman*. Clerk, *Sinclair*.

D. D.

N° CXLII.

December 10. 1794.

JAMES WADDEL,

AGAINST

JOHN BROWN.

TACK.—PERSONAL and REAL.—*A lease of an urban tenement is effectual against singular successors.*

DAVID MACQUATER, in 1791, by a missive, granted to John Brown a lease of a dwelling-house and workshop in Glasgow for 17 years. Brown immediately entered into possession.

In 1792, Macquater sold these subjects to James Waddel, who, in 1793, brought an action of removing against Brown, in which he stated, that he had not been informed of the existence of the lease at the time of the purchase, and in point of law,

Pleaded: A lease is at common law a mere personal right; Macdowall, b. 2. tit. 9. § 1. The statute 1449, c. 17. has indeed made leases of “*lands*” effectual against singular successors, but neither the letter nor the spirit of that statute apply to leases of urban tenements. It is declared to have been made for the “*fastie and favour of the puir people that labours the ground.*” Indeed, at its date, there were no leases of houses within burgh, and therefore, it could not be intended to remedy an inconvenience which did not exist.

Besides, a farm or other rural subject, when let in lease, yields an annual profit; from it the lessee in general derives the maintenance of himself and family, and upon the faith of the lease he lays out his stock in making improvements. Such lease is therefore much more an object of favour than that of an urban tenement, from which the possessor derives no income, and on which he is not even entitled to make meliorations without the consent of the proprietor; Erskine, b. 2. tit. 6. § 27.; Stair, 5th February 1680, Rae against Finlayson, stated in Dict. vol. ii. p. 417.

Answered: The act 1449, was meant to protect lessees of all heritable subjects, Stair, b. 2. tit. 9. § 2.; accordingly, although poor labourers of the ground only are mentioned, it was early extended to lessees of mills and fishings; besides, the word “*lands*,” in our law language, comprehends burgage as well as rural tenements; Supplement to Fac. Coll. p. 303. 27th January 1768, Maclauchlan against Maclauchlan.

The exclusion of urban tenements, too, from the benefit of the statute, in the present state of society, would be highly inexpedient and

and unjust, when leases, not of dwelling-houses only, but of valuable buildings within burgh for the purpose of manufactures, are frequently granted, and on the faith of the latter large capitals expended; particularly as the universal understanding of the country has long been, that they are good against singular successors.

The decision, 5th February 1680, Rae against Ferguson, is erroneously stated in the Dictionary, the point now in question not having occurred in that case; Fountainhall, vol. i. p. 95.; and as Mr Erskine refers to this decision, as abridged in the Dictionary, as the sole ground of his opinion, it is entitled to no consideration.

The Lord Ordinary found, " That the missive of set by David Macquater the former proprietor, in favour of John Brown the tenant, being clothed with possession, is effectual against James Brown the purchaser."

On advising a reclaiming petition and answers, the Court considered the case as perfectly clear, and unanimously " adhered."

Lord Ordinary, Polkemmet. Aft. Jo. Clerk. Alt. Connel. Clerk, Menzies.

R. D.

▷ CXLIII.

December 10. 1794.

JANET OLIPHANT,

AGAINST

MARGARET and ELEONORA OLIPHANTS.

IMPLIED WILL.—CONDITIO SI SINE LIBERIS.—*Where an heir of entail has exercised a reserved faculty of burdening the estate in favour of younger children to its full extent, by granting a bond of provision to those in existence at its date, if he marry again, and die without making any alteration on the bond, a posthumous child is entitled to a share of it.*

THIS case is a sequel of that reported, Fac. Coll. 19th June 1793, Oliphant against Oliphant.

Janet Oliphant, in consequence of the reservation in her favour to the interlocutor, stated in that report, brought an action against her

her two sisters by the former marriage, and against her brother the heir of entail, concluding, as a posthumous child, for her share of the bond of provision.

The Lord Ordinary “found her entitled to one-third of the provision in question.”

And on advising a reclaiming petition and answers, the Court, proceeding on the grounds mentioned in the former report, with only one dissenting voice, “adhered.”

Lord Ordinary, *Craig*.
Clerk, *Menzies*.

A&T. *W. Macleod-Bannatyne*.

Akt. *Rolland*.

R. D.

N^o CXLIV.

December 12. 1794.

The TRUSTEE on the sequestrated Estate of Walter Monteath,

A G A I N S T

COLIN DOUGLAS and Others.

BANKRUPT.—Act 1696. c. 5.—*An heritable bond of relief granted by the principal debtor, and bona fide accepted by cautioners in a bond of corroboration of an old debt, does not fall under the act 1696, if both bonds be executed unico contextu, although infestment be not taken on the bond of relief till within 60 days of the principal debtor's bankruptcy.*

WALTER MONTEATH was nearly related to the late Dukes of Douglas, who at different times lent him above L. 12,000.

For the greater part of this sum, he got heritable security over his estate of Kepp, the value of which, however, was not equal to the sums he had lent upon it.

The Dukes died in 1774, leaving a settlement, vesting her whole funds in trustees, who were directed, after paying her Grace's debts and legacies, to employ the residue of her fortune in the purchase of lands, to be entailed in favour of her nephew Archibald Douglas, and certain other substitutes. It was further declared, That the trustees should hold the lands in their own names, till the heir for the time should arrive at the age of 22, and that after that event, they should not be obliged to denude, till required by him.

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In 1782, the Duchefs's nephew had arrived at the age of 19, and the trustees having consulted counsel, how far they were bound to purchase lands with the trust-funds, they were advised to do so.

The trustees having accordingly set about recovering the trust-funds, they applied to Mr Monteath for payment of what he owed, and threatened him with diligence. He, on the other hand, repeatedly begged delays, until a peace with America, where the greater part of his funds were locked up, and at the same time proposed to sell to the trustees his estate of Kepp on reasonable terms.

At a meeting of the trustees in July 1783, Mr Monteath offered to find security to pay the debt at Martinmas 1784, in so far as it exceeded the value of his estate, upon the trustees consenting to supersede personal diligence against him till that term.

This proposal having been agreed to, Thomas Monteath his brother and partner, granted the trustees one bond of corroboration for L. 1250, and Colin, Robert and Campbell Douglasses, his brothers-in-law, "for their further security," granted them another for the like sum. This last bond was signed by Colin and Campbell Douglas, 9th March 1784, and by Robert at London on the 20th of that month.

On the 26th March, Walter Monteath granted his brothers-in-law an heritable bond of relief over his dwelling-house in Glasgow, the value of which was from L. 600 to L. 700 Sterling. This bond referred to the bond of corroboration, which it was declared had been granted on the faith of it.

On the 5th February 1785, Mr Monteath sold his estate for L. 9743, 17s. to the trustees, who were infest on the 24th March thereafter.

Infestment was taken on the bond of relief, 17th October 1785, and the seisin afterwards recorded.

On the 7th December 1785, Mr Monteath was rendered bankrupt in terms of the act 1696. His estate was afterwards sequestrated, and the trustees for his creditors founding on that statute, brought a reduction of the heritable bond of relief granted by him to the Messrs Douglasses, the seisin on it not having been taken till within 60 days of his bankruptcy; and

Pleaded: 1st, The bond of relief was not a security for a *novum debitum*. The defenders had a personal claim for relief independent of it against Mr Monteath from the 20th March, the last date of the bond of corroboration, whereas, it was not signed till the 26th, so that it was granted in security of a debt which had subsisted for at least six days. Besides, in questions on the act 1696, it is not the date of the bond, but of the seisin, which is regarded, so that in fact, the right now under reduction was granted in security of a debt which had existed nearly eighteen months. If persons so nearly related to Mr Monteath as the defenders, had taken immediate infestment on the house in which he lived, it would have

excited the suspicions of his creditors, he would instantly have been made bankrupt, and would thus have been prevented from prosecuting trade, and contracting further debts to their prejudice. Expediency, therefore, requires that the statute should reach this case. See also Dict. vol. i. p. 86. Dalrymple, p. 232. and 244. 29th January, and 12th December 1717, Grant against Duncan; 19th January 1726, Chalmers against the Creditors of Riccarton.

But, *2dly*, The bond of relief was indirectly a security to the Duchess's trustees for the old debt due to them, and so comes under the very words of the statute. If it had not been for this debt it never would have been necessary, and although it was directly granted to the defenders, the trustees alone were benefited by it. If securities like the present were supported, a person on the eve of bankruptcy, who wished to give a preference to a favourite creditor, would find no difficulty in getting some person to be cautioner for him, as he could be secured from loss by taking an heritable security in relief, and thus the object of the act 1696, would be entirely frustrated.

Answered: 1st, It may be true, that a claim of relief arose to the defenders on signing the bond of corroboration, but as it contained no obligation of relief, a separate bond became necessary for that purpose, because otherwise, the defenders, upon paying the debt, could not have rendered their claim effectual without a process at law. Both bonds, however, were executed *in unico contextu*; the bond of corroboration was signed by Robert Douglas at London on the 20th March, and supposing it to have been sent off next day, it could not, according to the arrangements of the posts at that time, have reached Glasgow till the 26th, the date of the bond of relief; it is impossible therefore to consider the bond of relief, otherwise than as a security instantly given for a *novum debitum*.

The attempt made by the pursuer to split the bond into two parts, and to hold the investment afterwards taken on it as a security for the debt contracted by the personal obligation, is a refinement which has no foundation in the statute, and has been long ago exploded; *Kilk. voce Bankrupt*, 29th January 1751, Johnston against Burnet and Home.

2dly, If there had been any thing fraudulent in the transaction; if the security had been granted to the defenders in trust for the Duchess's trustees, or as third parties interposed, in order to elude the statute, as in the case, 9th March 1781, Robertson against Blackie, it would then have been justly liable to reduction. But all parties in this case, were *in optima fide*. The trustees made a demand on Mr Monteath, from a sense of duty, that they might be enabled to lay out the money on land agreeably to the terms of the trust, and to the opinion of counsel, and when security was offered for it, they accepted it, not so much from any apprehension of Mr Monteath's circumstances, as that they might be

be secure of the money being paid at certain terms, so as to leave sufficient time for realizing it before the trust expired.

The motives of the defenders were equally pure. Their view was to serve Mr Monteath, not the trustees; and although they stipulated a security over the house, it is clear they had no suspicion of his failure, as it is scarce worth half the sum they engaged for. The heritable bond did not afford even an indirect security to the trustees. Its obligation was merely contingent. If the defenders had failed, without paying any part of the debt, the house would have remained unburdened to Mr Monteath and his creditors. Neither could the trustees have prevented the defenders from renouncing this security at any time. Were it therefore in these circumstances to be reduced, no man could with safety be cautioner for another.

The Lord Ordinary reported the cause on informations.

The Court, by a great majority, found, That "the heritable security in question fell under the act 1696."

When the cause however came again before the Court, on a reclaiming petition and answers, in which the circumstances attending the transaction were more fully brought out, it being thought to involve a new and important point, a hearing in presence was ordered.

When it was afterwards advised, the Court were much divided in their sentiments.

A majority were for sustaining the security.

The bond of relief, (it was observed), certainly does not come within the letter of the statute, being a *novum debitum*, *quoad* the cautioners, and in determining whether cases of this sort fall under its spirit, each must depend in a great measure on its own circumstances. In the present case, no evasion of the statute was intended. At the time the two bonds were granted, neither the trustees, nor the defenders, nor Mr Monteath's other creditors, had any suspicion of his approaching bankruptcy. The trustees accepted a personal bond of corroboration for a similar sum from his brother and partner. The defenders accepted a security not more than half sufficient to relieve them; and so good was Mr Monteath's credit, that his other creditors did not proceed to diligence against him, although they saw his estate sold, and infestment publicly taken on it. If in such circumstances the bond of relief were reduced, no person could with safety become cautioner for a merchant, and many cases might be figured where this would be attended with the greatest hardship. For instance, bankers are not fond of security on land at any time, indeed till the present bankrupt-act, it could not be given for future advances on a cash-account, yet were the pursuer's doctrine well founded, even merchants possessed of

of land would find it difficult to get their friends to become personally bound with them, (especially in times of general distrust, when such aid is most needed), as the validity of the heritable security which they could give in relief, would depend on their remaining solvent for 60 days.

On the other hand, several of the Judges remained of opinion, that the interlocutor should be adhered to. Nothing, it was observed, would tend so much to narrow the beneficial operation of the statute, as to make every case of this sort a question of *bona or mala fides*. There are certain leading features in every transaction, by which it is easy to distinguish whether it falls within its spirit. Although, in this case, both the trustees and the defenders are much above any suspicion of planning a fraud, still the effect of the transaction was to give a security for an anterior debt, and although the defenders were not fully secured by the bond of relief, yet it was the only security which Mr Monteath had to give.

The Court found " That the heritable security in question did not fall under the act 1696."

A reclaiming petition was refused without answers.

Lord Ordinary *Abercromby*. A&S. Solicitor-General *Blair*, Arch. *Campbell*, *Moodie*.
Alt. Lord Advocate *Dundas*, *Rolland*, *Maconochie*, Arch. *Campbell*, junior.
Clerk, *Menzies*.

R. D.

N° CXLV.

December 12. 1794.

The TRUSTEES for the Creditors of John Brough,

A G A I N S T

The HEIRS of Robert Selby.

RIGHT IN SECURITY.—CAUTIONER.—BANKRUPT.—*An heritable security in relief granted to a cautioner in a cash-account, found not to cover sums drawn out at the date of the infeftment, where, in consequence of future operations by the principal debtor, these sums were repaid, and another balance afterwards created, which the cautioner paid, the principal debtor having become insolvent.*

ROBERT SELBY, on the 17th June 1783, became joint obligant with John Brough, in a cash-account with Sir William Forbes and Company, to the extent of L. 500 Sterling to be kept in the name of Brough.

Selby being only cautioner for Brough, he, of the same date, got from him a bond of relief, containing a disposition in security of some heritable property, on which he was immediately infeft.

Previously to Brough's obtaining this cash-credit, he had an account-current with Sir William Forbes and Company, on which, at the date of the bond granted by Mr Selby and him, he owed a balance of L. 402, 16 s. for which Mr Selby, by joining in the new security, became liable; but Brough having paid in various sums, to his cash-account, between the 17th June 1783 and the 6th August following, this balance was wholly extinguished, and a small one created in his favour.

Brough became insolvent in 1788, and at that time, in consequence of a variety of subsequent operations on his cash-account, there was a balance against him of L. 539 : 12 : 5.

Mr Selby having paid this sum, his heirs claimed to be preferred for it on the price of the subjects over which his security extended.

The Court, however, found, that “ they were only preferable
“ in virtue of Robert Selby's infeftment for the sums they could
“ instruct to have been advanced at the date of the said infeft-
“ ment *.”

In consequence of this judgment, Mr Selby's heirs limited their demand to the L. L. 402, 16 s. which had been advanced to Mr Brough before the 17th June 1783.

To their claim thus restricted, the trustees for the creditors

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Objected :

• See Fac. Coll. 2d March 1791, Creditors of Brough against Heirs of Selby.

Objected : As the L. 402, 16 s. due by Brough at the date of Selby's infestment, were afterwards wholly extinguished, the balance since paid by Selby was entirely a new debt, contracted after the date of his infestment, and consequently not secured by it : Fac. Coll. 16th January 1788, Pickering against Smith Wright and Gray ; 14th November 1789, Stein against Newnham Everett and Company.

Answered : It is admitted, that Mr Selby's heritable security at its date, covered a debt of L. 412, 16 s. Now, an infestment once legally constituted, cannot be extinguished or diminished by voluntary payments, far less by the daily fluctuation of a cash-account, or indeed in any way, unless by a renunciation duly recorded, or by sums recovered, in virtue of legal execution ; Dict. vol. ii. p. 353, 354, 355. ; Kames, 16th February 1734, Earls of Loudon and Glasgow against Lord Rofs ; Falc. 19th June 1745, Campbell against the Creditors of Auchinbreck ; Fac. Coll. 1st March 1781, Bank of Scotland against Bank of England.

Replied : It may be true, that a real security is not lessened in proportion as the debt is reduced by partial payments ; but every partial payment, nevertheless, *pro tanto* diminishes the debt, and when it is wholly paid, the security must necessarily be at an end, for a security cannot exist when the debt it was meant to secure is extinguished ; ff. l. 43. *de solut. et liberat.* (lib. 46. t. 3.) l. 129. *de regul. juris* ; Macdowall, b. 4. tit. 45. § 182.

The Court, on the grounds stated for the objectors, pronounced the following interlocutor : " In respect it appears from the accounts of Sir William Forbes and Company, that the sum due " to them by John Brough on his cash-account, antecedent to " the date of the infestment in security in favour of the late Robert Selby, was afterwards fully paid up and extinguished, and " that the debt now claimed by Mr Selby's heirs was contracted " posterior to the date of said infestment : Find, That said heirs " are not, in virtue thereof, entitled to any preference on the " funds *in medio*."

Lord Ordinary, *Dreghorn*.
Clerk, *Pringle*.

For the Trustees, *Cullen*.

Alt. *Baird*.

R. D.

N° CXLVI.

December 13. 1794.

Mr BARON GORDON,

AGAINST

The REPRESENTATIVES of Robert Michie.

REMOVING.—*The heirs of a tenant for life may be removed summarily between terms.*

MR Robert Michie, minister of the parish of Clunie, at Whitsunday 1750, entered into possession of a farm, on a lease, to last “during all the time of his incumbency” in that parish.

Mr Michie remained minister of Clunie, and possessed this farm, till his death, which happened on the 15th June 1794.

Mr Baron Gordon, the landlord, did not dispute the right of his executors to the crop on the ground, and, as a matter of favour, he allowed them the use of the grafs for some time after the death of the tenant. Considering himself, however, as legally entitled to immediate possession of the farm, he, after giving the representatives of the deceased previous notice of his intention, on the 26th September, presented a petition to the Sheriff, praying that they might be ordained immediately to remove from it.

The Sheriff, on the 15th October, ordered them to remove in fourteen days.

By this time, the representatives had paid the rent for crop 1794.

They afterwards presented a bill of advocacy against the judgment of the Sheriff, which, having been refused, they, in a reclaiming petition,

Pleaded: A tenant is entitled to continue in possession after the period stipulated in the lease is completed, until he is regularly warned to remove; and it makes no difference whether continuance of possession is claimed by himself or his heir. A tenant for life has even higher powers than an ordinary lessee, and in so far as there is any difference between the situation of their heirs, the heir of the former is more entitled to favour as in his case the duration of the lease is altogether uncertain, and will generally be put an end to unexpectedly between terms, when his heir has provided no place to remove to, and when the

the effects of the deceased cannot be disposed of without great disadvantage. It is true, that the heir of a liferenter may be summarily removed; but there is this material distinction between a liferenter, properly so called, and a liferent-tenant, that the one possesses gratuitously, and therefore, upon his death, a renewal of the same right will not be presumed, whereas the other pays an adequate rent for the subject, from which the law presumes, that he draws his whole maintenance, and his right to which it has declared capable of being dissolved only in consequence of a regular warning. The tenants even of a liferenter cannot be removed at his death, without warning, as little could the assignees and subtenants of a liferent-tenant, and there seems the same reason why his heirs should be protected in the possession; Bankt. vol. ii. p. 116.; Erskine, b. 2. tit. 6. § 49.

Besides, the heir is liable for the current year's rent, and consequently is entitled to continue in possession. If it were otherwise, it would frequently be impossible to ascertain the proportion of rent due to the landlord.

Answered: When a lease is descendible to heirs, the representatives of the tenant are entitled to possess till they are regularly warned to remove. The heir has then a lawful title of possession, and tacit relocation takes place. But in a liferent-right, the heir, from the nature of the thing, is excluded. It never was supposed, that the heir of a liferenter was entitled to make up feudal titles to the subject; and although service is not necessary with regard to leases, the representative of a tenant for life has, for the same reason, no right to enter into possession. The liferent-infeftment or liferent-lease was the only circumstance which excluded the right of the proprietor, and, it being removed, he alone is entitled to assume possession; Craig, tit. *de migrando*; Stair, b. 2. tit. 9. § 38.; Mackenzie's Obs. on act 1555, c. 39.; 23d February 1760, Tennent against Tennent.

According to strict principle, perhaps, warning should not be necessary, even against the tenant of a liferenter; practice has however established its necessity; and as the tenant has a legal title of possession, there is obviously room at least for the distinction.

Farther, as the landlord, in such cases, cannot foresee the termination of the lease, or consequently give warning before the death of the tenant, if warning were afterwards necessary, it would frequently be in the power of the heir, when the lease was beneficial, to exclude the landlord for a year after the death of the tenant, contrary to the express stipulation of the parties, while, at the same time, wherever the rent was high, the landlord could not force them to continue in possession.

In the present case, there is no dispute about rent, and in every case of the kind, the proportion due to the landlord may easily be ascertained. Matters must necessarily be settled in this way, whenever the heir does not claim possession.

Upon advising a reclaiming petition, with answers, the Lords, upon the general ground, unanimously "adhered."

Lord Ordinary, *Ankerville*. Act. *Honyman*, Alt *Maconochie*. Clerk, *Pringle*.

D. D.

° CXLVII.

December 13. 1794.

ALEXANDER GOVAN,

AGAINST

JOHN GRAY.

SUSPENSION.—*When a cautioner in a suspension becomes bankrupt during its dependence, the charger cannot insist for new security.*

JOHN GRAY having presented a bill of suspension against a decree of an inferior judge, in favour of Alexander Govan, it was passed on caution.

The cautioner, after the suspension had come into Court, having become insolvent, the charger craved, that the Lord Ordinary should assign a term for the suspender's finding new caution, under certification, that the letters would be found orderly proceeded against him.

The Lord Ordinary took the point to report on minutes, and the Court afterwards ordered memorials. For the charger, it was

Pleaded: The same expediency which has made caution the condition of obtaining a suspension, seems to require its renewal on the bankruptcy of the cautioner, during its pendency, especially as the choice of the original cautioner lies not with the charger himself, but with the clerk of the bills; Macdowall, vol. i. p. 458. § 26.

Although the charger cannot quote any case directly in point, his plea is strongly supported by analogy. In the case of judicial sales, the creditors are entitled, on the failure of a cautioner, to insist for new caution; 8th March 1769, Stark and Clark against Johnston*. The Lord Lyon exacts new caution from messengers, as often as he finds it expedient. Notaries, if required are obliged to renew their bonds of caution, on the death or

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insolvency

* Not collected.

insolvency of their cautioner; and of old, when the practice in improbations was regulated by 1557, c. 62. new caution was found by the pursuer, when his former cautioner died, *pendente lite*; Balfour, tit. Improbation; see also Voet, lib. 2. tit. 8. § 3.; lib. 46. t. 1. § 2.; Corvinus, lib. 46. t. 5.; Huber, de stipulationibus prætoriiis, § 2.; Marsilius, de fidejussoribus, § 74.; Zoësius, tit. Qui satis dare cogantur; Heringius, de fidejussoribus, cap. 13.

Answered: As soon as caution is received by the clerk of the bills, the process is removed from his office to that of the clerks of Session, and a certificate afterwards from him, bearing, that the cautioner had become bankrupt, would be inept. Were it therefore necessary, that new caution should be found, the business of receiving it would be entrusted to the depute-clerks or some other officers of court; and there being none to whom it belongs, shows that the demand is ill founded. Indeed, the charger admits, that it is altogether unprecedented, although similar cases must frequently have occurred, and, if granted, it would occasion constant disputes respecting the sufficiency of the original caution, and produce much delay in the determination of causes.

The cases mentioned by the charger bear no analogy to the present. In the articles of judicial sales, sufficient caution for the price is always expressly stipulated. The Lord Lyon is ordained by special statutes, (1587, c. 46. 1592, c. 125.) to take caution from messengers; and from the public nature of their office, it is consistent with reason, that on the death or insolvency of one cautioner, they shall be obliged to find another. And notaries, are obliged to renew their caution, in consequence of a special obligation in the bond, granted by them on their admission.

Observed on the Bench: Practice has very properly established, that the suspender must in most cases find caution *judicatum solvi*, before his cause can be removed from the inferior court, although this Court may dispense with his doing so, if they see cause. But after a cause is brought into Court, the parties are entitled to be heard, and the proceedings are not to be overturned, because the cautioner has become insolvent. The suspender is not to blame for the bankruptcy of his cautioner, and it would be unreasonable to make him lose his suit, whether right or wrong, merely on that account.

The Court, with only one dissenting voice, “repelled the demand of new caution, and remitted to the Lord Ordinary to hear parties on the merits of the cause.”

Lord Ordinary, *Abercromby.*

Alt. Arch. *Campbell, Fletcher.*

For the Chargers, *Tait, R. H. Cay.*

Clerk, *Sinclair.*

R. D.

CXLVIII.

January 14. 1795.

FRASER, REID and SONS, and their TRUST-INDORSEES,

A G A I N S T

LANCASTER and JAMIESON.

EXECUTION.—*An arrestment used in the hands of a merchant found to be null, because it was executed by leaving a copy of it for him at his counting-room, which was apart from his dwelling-house.*

MESSRS Lancaster and Jamieson, creditors of Campbell, on the 6th February 1793, executed arrestments against his debtors, and in particular against James Coats, merchant in Glasgow. The execution of the arrestment bore, “of which letters
 “ I left a just copy of arrestment for each of the said Michael
 “ Muirhead and Company, James Coats, Mitchell and Anderson,
 “ within each of their respective accounting-houses in Glasgow,
 “ with each of their respective clerks, to be by them given to
 “ each of their said respective masters, because, after enquiry
 “ made by me for them there, I could not apprehend them personally.”

The counting-house of Mr Coats was in a different street, and at a considerable distance from his dwelling-house.

Messrs Fraser, Reid and Sons, likewise creditors of Campbell, executed an arrestment, dated 6th June 1793, against Mr Coats, by delivering a copy of it to himself, personally apprehended.

Mr Coats having called both arresters in a multiple-poining, Messrs Fraser, Reid and Sons

Pleaded: The act 1540, c. 75. requires, that officers executing King's letters shall pass to the “door of the principal dwelling house where the person to be summoned dwells, and has his actual residence at the time,” and where forms are established by statute, they must be literally complied with; Stair, 11th December 1679, Countess of Cassilis against the Earl of Roxburgh; President Falconer, 1st February 1684, Anderson; Forbes, 14th July 1708, Bruce against Hall; Dictionary, vol. i. p. 270. 23d November 1681, Sanders against Jardin; Macdowall, b. 4. tit. 37. § 3. The arrestment of Lancaster and Jamieson, therefore, being executed at the counting-room, and not at the dwelling-house of the arrestee, is inept.

Answered: As the sole object of the statute 1540 was to establish a method of executing diligences, by which the parties should

should with certainty be informed of those directed against them, its spirit and intention have in this case been fully attained.

The literal enactments of the statute have been departed from in many particulars more essential than the present; for instance, it enjoins messengers to pass to the principal door of the dwelling-house, "to show the cause of their coming, and to make public exhibition of their letters;" all these solemnities are, however, for the most part, omitted. Besides, the practice objected to has been very common, particularly in Glasgow.

The decisions referred to were pronounced above a century ago, when the statute received a more rigorous interpretation, and are opposed by others of a more recent date; Forbes, 22d December 1710, Baillie against Menzies: Fac. Coll. 17th July 1752, Clerk against Waddel.

The Lord Ordinary repelled the objection.

But on advising a reclaiming petition, answers, replies and duplicates, the Court unanimously "in respect the execution of the arrestment was informal, sustained the objection to the interest produced for Lancaster and Jamieson."

Lord Ordinary, *Stonefield*. For the Objectors, *Lord Advocate Dundas, J. W. Murray*.
Alt. Maconochie, Fletcher. Clerk, *Pringle*.

R. D.

Pleaded: The obligation of a factor charging a commission *del credere*, extends only to warrandice of the solvency of the purchasers from him, and is at an end when the money is recovered from them, for which the factor no doubt is liable to account to his constituent; but if the latter desires it to be remitted to him, a new and separate mandate takes place, in which all that is incumbent on the factor is, to transmit a bill on a house responsible at the time, whose solvency he is not obliged to warrant, unless he be allowed a new commission on that account.

In the present case, it was entirely owing to the charger's anxiety to have his money before the original bills fell due, that recourse was had to the house of Bertram, Gardner, and Company, or any loss occasioned.

Nor in a question between the present parties, does the bill being drawn in favour of the suspenders, and being afterwards indorsed by them, make any difference. They acted merely *fictio nomine*. They would have done all that was incumbent on them, if they had taken the bill payable directly to Mr Scott, who can qualify no loss from their having adopted a different method. It will not be presumed, that they meant gratuitously to undertake a new obligation. The same observation applies to the letters which were written by the suspenders, under an erroneous impression, that they were antecedently liable for payment of the bill.

Answered: A person whose goods are sold at a distance from the place of his residence, and who is necessarily often ignorant of the situation of those with whom his factor must enter into contracts, has equal reason to wish to have the safety of the remittances warranted to him, as the solvency of the purchasers; and accordingly, the commission *del credere* extends equally to both; Beawes, v. Bills of Exchange, p. 428, 429. § 97; Mortimer's Dict. v. Bills; and that such was the understanding of the suspenders, is evident from their making themselves at any rate liable for the bill, by indorsing it; 5th July 1782, Connel against Maclelland; and from the assurances of payment contained in their letters.

The Lord ordinary repelled the reasons of suspension, and found expences due.

Upon advising a reclaiming petition, with answers, it was

Observed: That, as the charger had sustained no loss from the suspenders having indorsed the bill, and written the letters, these circumstances could no farther affect the present question, than as they tended to shew their own sense of the extent of their obligation; but that as they had the money of the charger in their possession, or bills which they were bound to warrant to be good, they ought to have transmitted a bill of a public Bank, and had

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it was not meant to cut off claims arising from considerable mercantile transactions, like the present, which, at the date of the act, were very rare in this country ; and further, that it did not extend to actions arising upon the contract of mandate.

The Lords unanimously “repelled the defence of the triennial prescription.”

Lord Ordinary, Stonefield.
Clerk, Sinclair.

Ast. Arch. Campbell.

Alt. Geo. Fergusson.

R. D.

N^o. CLI.

January 27. 1795.

JOHN MACLELLAND,

AGAINST

ADAM and MATHIE.

SALE.—*A wholesale dealer in spirits, who had agreed to supply a retailer for a year, at a certain price, found liable in damages for refusing to fulfil his agreement, although the market-price of spirits had risen considerably, in consequence of a tax imposed during the currency of the year.*

ADAM and Mathie, wholesale spirit-dealers, in September 1792, agreed to supply John Maclelland, a retailer, for a year with British spirits, of a certain quality, at a fixed price.

An additional tax having been imposed on British spirits during the currency of the year, their price rose considerably ; and Adam and Mathie having on that account refused to fulfil their agreement, Maclelland brought an action of damages against them, in which they

Pleaded : *1mo*, The object of the contract was merely to secure the parties against the ordinary fluctuations in the market-price of the commodity. They had no view to the extraordinary rise occasioned by a new duty, which might eventually have been so high, as to have made performance of the contract, if not impossible, at least altogether ruinous to the defenders. They fall, therefore, to be absolved from the present action, upon the same principle, that an abatement of rent is allowed wherever the va-
lue

ue of the subject let is greatly diminished by extraordinary
ausfes; *L. 15. ff. loc. cond.*; Erskine, b. 2. tit. 6. § 41.; Bankton,
. 1. tit. 20. § 13.; Fount. 12th January 1697, Mackenzie; Kames,
6th July 1762, Foster and Duncan against Adamson and Wil-
amson.

2do, The defenders have had former agreements of a similar
ature, with the pursuer; but since the imposition of the tax, he
as demanded a much greater quantity of spirits than usual, or
nan was necessary for him, in the usual course of his trade, mere-
y with the view of making profit at their expence.

The Lord Ordinary repelled the defences.

A reclaiming petition being presented, the Court in general
vere clear, that a contract of sale could not be affected by a fu-
ervenient law, whether diminishing or increasing the price of
he commodity, and therefore refused the petition, without an-
wers, on the general point; but remitted to the Lord Ordinary
o inquire into the averments of the defenders, as to the extra
quantity.

Lord Ordinary, *Abercromby*.

For the Petitioners, *Cranston*.

Clerk, *Sinclair*.

D. D.

N° CLIL

January 27. 1795.

ARCHIBALD GRAHAME,

AGAINST

WILLIAM GILLESPIE and Company.

BILL OF EXCHANGE.—BLANK WRIT.—*When the sum in a bill is frau-
dulently increased, after it is accepted, by the addition of certain words
not in the original document, and the alteration is apparent ex facie,
action will not be sustained on it, even for its original amount; but when
blanks are left in a bill at the time of accepting it, in consequence of which
the drawer is afterwards enabled, by the addition of figures or words,
to increase the sum, without giving the bill a suspicious appearance, the
accepter is liable to the onerous indorsee for its increased value.*

ON the 24th October 1791, William Gillespie and Company,
in consequence of a consignment of goods made in their
hands, accepted a bill, holograph of William Robb, in the fol-
lowing terms:

4 S

L. 58

L. 58, 10 s. Sterling.

Glasgow, 24th July 1791.

Six months after date, pay to us or order, at the shop of Mr Andrew Sibbald, the sum of Fifty-eight pounds ten shillings Sterling, value received from

(Signed) DAVID ROBB & Co.

To Messrs William Gillespie and Co.
linen-printers, Anderston.

William Robb afterwards increased the sum in the bill to L. 458, 10 s. by inserting the figure "4" between the "L." and the "5" at the top of the bill; drawing a score through the word "or," at the end of the first line; adding the words "or to our" at the beginning of the second; and the words "Four hundred" at the beginning of the third; all which he was enabled to do, in consequence of the blank left betwixt the "L." and the "5," and of there being no writing on the stamp. The fraud was so well executed, that it could scarcely have been discovered, unless by a person aware of it, who might, on a narrow inspection, have perceived, that the words added were written a little differently from those which followed them, and not quite in the same line.

On the 29th October 1791, William Gillespie and Company, in consequence of a second consignment of goods, accepted another bill for L. 50 Sterling, dated 29th July 1791, payable six months after date. This bill was written, and its amount altered to L. 450, by Robb, in a similar manner with the former. The fraud, however, was not so well executed; in particular, the word "four," which in it was inserted at the end of the second line, had a very crowded appearance.

Both bills were written upon shilling stamps.

These bills, thus altered, were discounted by William Robb with Archibald Grahame, cashier for the Thistle Bank at Glasgow, who, having threatened to charge Gillespie and Company for payment of them, they raised a suspension, in which they offered to prove, that it was the general practice not to write upon the stamp, and further

Pleaded: 1mo, When a document of debt is altered by forgery, or vitiation, action will not be sustained on it, even to the extent for which it was really granted, because, after the alteration, it affords no legal evidence of its former state; Termly Reports, vol. iv. 1791, Master, &c. against Miller; Fount. 9th July 1712, Lawrie against Reid. The charger must therefore prove his debt *aliunde*, and bring a regular action for constituting it.

2do, At any rate, the acceptor cannot be liable beyond the original sum. The obligation of the granter of a bill, as of any other writing, is founded entirely on his own consent. There is only this difference between them, that the former is understood to consent to pay the amount of the bill as at the date of accepting it,

it, without stating any exceptions which do not appear from the bill itself.

Every time a bill is indorsed, a new transaction takes place between the indorser and indorsee, by which the former binds himself, that the amount of the bill, as at the date of the indorsation, shall be paid. But to this transaction the acceptor is no party, and the measure of his obligation cannot be affected by it. To entitle the indorsee to operate payment from him, it must be established, that he consented to pay it. In general, his subscription is sufficient to fix this obligation against him. This, however, will not always hold. The bill may be palpably vitiated or erased, or, as in the present case, words may have been added to it, after he has signed it. In such cases, the ingenuity of the fraud, or the difficulty of detecting it, cannot vary the question. Indeed, the objection to the bill may not be at all perceptible on the face of it; it may have been extorted by force or fear; 6th December 1787, Wightman against Graham; or granted by a person incapable of consent.

After the acceptor returns the bill to the drawer, he has no more control over it, but the indorsee may make proper inquiry before advancing his money; and if he neglects to do so, as the acceptor and he are *in pari casu* in every other respect, it is he who should suffer for the omission.

Answered: 1mo, It is acknowledged, that the subscription of the acceptor is genuine, and that the rest of the bill is in the hand writing of the drawer, and there is evidently no rasure made, a single letter nor word put in place of another. There be- therefore no forgery or vitiation in the present case, the law with respect to forged or vitiated writings, does not apply.

A forged deed is altogether null, because it is not the deed of the person against whom the forgery is committed; and a vitiated deed affords no evidence of its original state; whereas, in the present case, there is merely an addition made to a true bill, and there can be no reason why it should not be supported to its original extent.

2do, But farther, as the acceptor of a bill agrees to subject himself to the consequences of his subscription, and, as bills, like real rights, cannot be affected by exceptions, which do not appear *ex facie* of them, when a bill liable apparently to no objection comes to the hands of an onerous indorsee, in consequence of its being delivered by the acceptor into the hands of the drawer, it will be good against the former, although it may have been fraudulently obtained from him, or deposited with the drawer, in trust.

In the present case, the fraud has been committed by means of an addition made to the bill; but suppose there had been subjoined to it a declaration, that it should not be payable till the death of the acceptor, if the part of the paper, containing this condition had been torn off, the acceptor would have been obliged immediately to pay its contents to the indorsee. If the

he bill had been totally blank when the acceptor adhibited his subscription to it, he must have been held to have given the drawer a discretionary power in filling it up. The same would have been the case, if the bill had been complete, except as to the sum, or if a part of the sum had been left blank, with the intention of enabling the drawer to enlarge it at pleasure. Now, since blanks were left in the present case, sufficient to allow the fraud to be committed, without suspicion, it can make no difference in a question with an onerous indorsee, that it was not intended or imagined by the acceptor, that any improper use would be made of them. No precaution on the part of the indorsee would have enabled him to detect the fraud while the acceptor, by writing on the stamp, or drawing lines across it, might have prevented the possibility of its execution. It would be extremely dangerous, if acceptors and indorsers were not liable for the consequences of blanks carelessly left by them.

3rd. The ante-dating of the bill is of itself sufficient to subject the indorsers. By that measure, the chargers were deceived into a belief that Robb was so little distressed for money, that he could afford to allow good bills to lie by him for three months without making use of them. Indeed, it was owing to this alone that Robb was enabled to commit the fraud. The bills are written upon shilling stamps, and in July 1791, (the date they bear), bill to any amount might be written upon a stamp of that value; but before October 1791, (the real date of the transaction), in consequence of an alteration in the stamp-laws, a bill for a larger sum than L. 100, was ineffectual, if written on a shilling stamp, so that if the bills had not been ante-dated, the charger, on that account alone, would have refused to discount them.

Replied. It can easily be proved, that prior to the frauds alleged to have been committed by Robb, it was a general practice, even among the most cautious people, not to write upon the stamp; and no acceptor, however circumspect, would have hesitated at signing a bill with such a blank, or thought of drawing lines across it. The indorsers, therefore, were guilty of no fault whereas, the charger, by proper attention, might have discovered the fraud.

The practice of ante-dating bills is very common, and perfectly harmless. It has been introduced from its being customary to grant bills for real transactions payable in six months after date, and because bankers will not discount them, till within three months of the term of payment. To them, however, date of the transaction is of no consequence, provided the name on the bill be good, and the term of payment near. The ante-dating the bills could not deceive the charger as to Robb's credit, because, though they had been granted of their nominal date could not have been discounted before their real one.

The alteration in the stamp-laws cannot affect the present question, because, after it took place, a shilling stamp contin-

be the proper one for the sum for which the bills were actually accepted.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: The defences of extortion by force or fear, of forgery or vitiation, are good against onerous indorseees, because bills liable to such objections want the consent of the granter. The deed is equally a forgery, when additional words are inserted, as when the subscription is counterfeited.

But when the acceptor of a bill delivers it to the drawer, containing blanks, which enable the latter afterwards to increase its amount, without giving it a vitiated or suspicious appearance, the acceptor must be presumed to have consented to the alteration, in the same manner as he would be held to have given a discretionary power to the drawer, in filling up the sum, if the blank had been total.

The practice as to writing or not writing on the stamp, is by no means uniform. The leaving a blank can give no room for fraud, except where the sum in the bill immediately follows it. A proof even of uniform practice of leaving the stamp blank, in bills where this is not the case, would be of no consequence.

The fraud on the first bill is so well executed, that a person not aware of it could not have discovered it; and as the loss must fall either on the onerous indorsee, or on the acceptor, it must be borne by the latter, to whom a certain degree of negligence in leaving the stamp blank may be imputed.

The second bill, however, has a crowded and suspicious appearance. The charger ought not to have discounted it, and must therefore bear the loss. The charge on it may however be sustained to the extent of the original sum; because there arises from the proceedings in the cause, what is equivalent to a judicial acknowledgment, that so far the debt is a just one.

The Court in general did not lay much weight on the antedating of the bill, though it was mentioned as a circumstance which enabled them to apply the general principle against the acceptor with less regret.

The Lords (20th November 1794) by a considerable majority, "found the letters orderly proceeded, so far as concerns the bill for L. 458, 10 s. Sterling, charged on; and with regard to the other bill charged on, for L. 450, found the letters orderly proceeded, to the extent of L. 50 Sterling; and suspended the charge for the remaining L. 400 Sterling."

A petition for Archibald Grahame, reclaiming against this judgment, in so far as it suspended the charge, was (9th December) refused, without answers.

A petition for Gillespie and Company against the remaining part of the interlocutor, was followed with answers; upon ad-

vising which, the Lords suspended the letters *simpliciter* as to the bill for L. 450.

Lord Ordinary, *Eskgrove*. For the Suspenders, *Dean of Faculty Erskine, Tait, Turnbull*.
Alt. Rolland, Arch. Campbell. Clerk, *Pringle*.

The Court, at the same time, determined several other cases upon the same grounds.

D. D.

N^o CLIII.

February 4. 1795.

IRVING and JOPP, and their Attorneys,

A G A I N S T

JOHN COLLINS.

INFESTMENT.—*The right of the Crown-rentallers of Lochmaben may be transmitted by infestment.*

THE rentallers of Lochmaben obtained their rights from the Crown, at a remote period. Their lands now form part of the barony of Lochmaben, the property of the Earl of Mansfield. In an action of declarator brought by them against one of his Lordship's ancestors, it was found, (28th December 1726), "That they have such a right of property in these lands, that they cannot be removed, and that they may dispose their right to extraneous persons."

James Kerr *senior*, one of these rentallers, granted an heritable bond to John Collins, over part of the lands contained in his rental-right. Infestment followed on the precept of seisin in the bond, and the seisin was duly recorded.

James Kerr *senior* afterwards conveyed his rental-right to James Kerr, his son, who again sold it to John Forsyth.

Messrs Irving and Jopp, creditors of James Kerr *junior*, having arrested the price of the subject in Forsyth's hands, he brought a multiple-poining, in which he called both Collins and Irving and Jopp, who also brought a reduction of Collins's bond and seisin. These actions having been conjoined, Irving and Jopp

Pleaded :

Pleaded : The proper and customary way of burdening upon rentals, is by a wadset-bond, with the attestation of a notary, certifying that the grantor is in real possession of the lands, completing the infeftment taken by Collins is inept, because the heritable bond not being infeft himself, he cannot be a warrant for infefting another person. It is beneficial to the creditors, whose rights are derived from a subject, by the infeftment, because they may be removed at pleasure. 4th July 1781, Mackenzie against Gullan, and although the rights in question have been, by the decree, declared permanent and transmissible, they are in fact of the same nature.

Answered : The granter of the heritable bond had the full and entire right to the lands vested in his person, and as the law laid down no precise form for the transmission of his right, there is nothing improper in his adopting the usual mode of conveying landed property ; see Dirleton, No. 89. Proprietors frequently grant feudal conveyances of subjects, particularly of patronages, which they themselves hold allodially.

The Lord Ordinary “ repelled the reasons of reduction, affirmed the defender, and, in the multiple-pounding, preferred the said John Collins.”

On advising a reclaiming petition, and answers, it was

Observed on the Bench : Although the subject in question may be burdened and transmitted without infeftment, yet it is capable of being feudalized.

The mode which has been followed in the present instance, is even preferable to the ordinary method of a wadset-bond and notarial instrument, in so far as it obliges the grantee to put his feisin on record, which renders the transaction public.

The Court unanimously “ adhered.”

Lord Ordinary, *Ankerville*.
Clerk, *Pringle*.

For Irving and Jopp, *R. Hamilton*.

Alt. *Williamson*.

R. D.

N° CLIV.

N° CLIV.

February 4. 1795.

Sir ANDREW CATHCART,

AGAINST

The EARL of CASSILIS.

EXHIBITION AD DELIBERANDUM.—*The right of the heir of line, or of former investitures, to bring an exhibition ad deliberandum, found to be cut off by an entail made by his predecessor, in favour of the heir-male.*

DAVID Earl of CASSILIS executed an entail of his estates of Culzean and others, in favour of himself and his heirs-male.

On his Lordship's death in 1792, Archibald Earl of Cassilis being the next heir called in the entail, got possession of the estates conveyed by it, with the title-deeds, which last, it as usual assigned to the heirs of tailzie. His Lordship, soon after, took infeftment on the entail, and put it upon record.

Sir Andrew Cathcart was one of the heirs-apparent of line to Earl David, and also (as he alleged) heir of provision in part of the lands entailed by him, of which, in consequence of certain destinations made by his Lordship's predecessor, Sir Andrew contended, that he could not be disappointed by the entail, which was gratuitous.

Sir Andrew, in these characters, brought an action against Earl Archibald, concluding for exhibition *ad deliberandum*, of all the writings in his possession relative to those lands, to which he alleged he had right as heir of provision.

In defence, Lord Cassilis

Pleaded : Earl David's entail followed by infeftment, is *ex facie* a complete title for vesting the property of the whole lands and title-deeds in the defender, and until it be set aside in a regular action of reduction, the pursuer in neither of the characters to which he lays claim, can have any title or interest to insist in this action; Erskine, b. 3. tit. 8. § 56; Harcarfe, *voce* Exhibition, No. 482. March 1683, Lady Yester against Lord Lauderdale. Its proper object is to enable the heir to deliberate whether he should enter, but there can be no occasion for such deliberation, where, as in this case, there is no estate to which he can enter.

Answered :

Answered: The deed of a predecessor, in order to deprive an heir-apparent of the privilege of pursuing an exhibition *ad deliberandum*, must be onerous, must be followed with infeftment, and must have completely denuded the granter; Stair, b. 3. tit. 5. § 1.; b. 4. tit. 33. § 4. 6.; Harcarfe, N^o 482, 483, and 484.; Erskine, b. 3. tit. 8. § 56; Macdowall, b. 3. tit. 5. § 7.; Kames, 30th November 1756, Heron against Herons; Fac. Coll. 12th January 1779, Macfarlanes against Buchanan; 8th August 1783, Lady Mary Campbell against Earl of Crawford; whereas the entail in question was not only gratuitous, but at Earl David's death was an undelivered personal deed, which he might have revoked at pleasure.

Replied: None of the authorities referred to support the plea of the pursuer; most of them indeed relate entirely to the question, What writings an heir, whose title is undisputed, is entitled to call for?

The Lord Ordinary “affoizied the defender.”

On advising a reclaiming petition, with answers, it was

Observed on the Bench: The deed of the late Lord Cassilis, clearly excludes the present action. This point was determined both in the case of Duke Hamilton against Douglas, 28th November 1761, and in that of Hamilton of Dalzell against Miss Hamilton of Roschall in 1756. The pursuer's object here is, not to get inspection of writs, in order to deliberate about entering, but to discover whether there are grounds for setting aside Earl David's entail. But for this purpose, he must make up titles, and bring a regular process of reduction and declarator, in which, after specially condescending on the papers wanted, he will be allowed a diligence for recovering them.

The Court unanimously “adhered.”

Lord Ordinary, *Craig*. A&G. *Geo. Fergusson*. Alt. Dean of Faculty *Erskine*, *Rolland*.
Clerk, *Home*.

R. D.

N° CLV.

February 4. 1795.

The TRUSTEE of David Dickson,

AGAINST

The CREDITORS of John Rae.

POINT 1.

RANKING AND SALE.—*When a creditor on an estate brought to judicial sale, obtains partial payments to account of his debt, in virtue of an interim warrant on the purchaser, and afterwards claims for the remainder of it upon the general fund under division, he is not entitled, in a question with the creditors, to impute the payments he has received, periodically towards extinction of the interest which may have grown on his debt since he obtained the warrant, but must turn them into a corresponding capital, as at the period when the price began to bear interest.*

A PROCESS of ranking and sale having been brought by the creditors of the late John Rae, a decree of ranking was extracted in 1770, and on 19th December of that year, the lands of Hirkledale, part of his estate, were sold to General Stewart Douglas, at the price of L. 6310, which he found caution to pay at Martinmas 1771, with interest from Martinmas 1770.

David Dickson stood ranked upon these lands for L. 1188, 5 s. as at Martinmas 1770, at which term it was agreed, that the principal and interest due to all the creditors should be accumulated into one sum, bearing simple interest.

In 1775, he applied for, and after a good deal of opposition, both from the other creditors and from General Douglas, obtained an interim warrant upon the latter, for payment of his debt, and by means of diligence used against the General, he received various partial payments.

In 1791, David Dickson assigned the balance remaining due to him, in trust to John Dickson, writer to the Signet.

In .

In 1789, the lands of Hurkledale were again sold by the creditors, for L. 6520, General Douglas having been unable to pay the balance of the purchase-money, which at this time, after deducting the partial payments made by him to David Dickson and others, amounted with interest to upwards of L. 7000. The cautioners for General Douglas were however able to pay the difference between the price which the lands gave at the second sale, and the balance due by the General on the first.

The price brought by these lands at the second sale, and various other funds belonging to the common debtor, having been recovered, the trustee for Dickson, in place of proceeding against General Douglas's cautioners, appeared in the process of division, and claimed to be ranked for the balance due upon his constituent's debt, which he alleged amounted to L. 978 : 17 : 2.

The creditors did not dispute Mr Dickson's right to claim, but objected to his mode of stating the balance on his debt. He, as in progressive accounts, had calculated interest upon his debt from Martinmas 1770, till he received the first partial payment, which he applied to the extinction of the accumulated sum, and then calculated interest upon the balance, till he received another partial payment, which he again deducted from the whole debt, principal and interest, then due to him.

The creditors, on the other hand, insisted, that the payments should not be imputed periodically in this manner; but that the sums received by him at different periods should be brought to a corresponding capital, as at Martinmas 1770, *i. e.* to a sum which, with simple interest upon it from that term, made up the total of what he had received. The account of partial payments stated, in this way, amounted to L. 578 : 13 : 4, leaving a balance of L. 609 : 11 : 8, for which Dickson fell to draw along with the other creditors.

In support of their objection, the creditors

Pleaded: Were Mr Dickson's mode of calculation adopted, he would, by means of his repeated accumulations of interest into a principal sum, draw a larger proportion of the funds *in medio* than the other creditors, whose debts are ranked in the same class with his own. By the mode which they propose, he, like them, will draw for his full accumulated sum, as at Martinmas 1770, with simple interest from that term, which is all he can justly demand. The Court, by granting the interim warrant, did not mean to injure the other creditors, nor did he, when he obtained it, desire to have any preference; on the contrary, he offered to find caution to pay back his proportion of any deficiency of the funds, at the ultimate division.

Answered: The method followed by Mr Dickson of imputing partial payments, is the simple and common one, and is always used in accounting between debtor and creditor. General Douglas's cautioners must account in that manner for the balance due
by

by them. By the act and warrant, the sum of L. 1188, 5 s. of the price, with all the interest which should become due upon it, was withdrawn from the common fund, in satisfaction of Mr Dickson's debt. The other creditors have no further connection with this sum; and indeed they have no interest to object to the mode proposed, as General Douglas's cautioners, who are solvent, must repay them whatever additional sum he draws from the funds *in medio*.

Replied: If Mr Dickson were demanding the balance of his debt from General Douglas, or his cautioners, perhaps his mode of calculating it might be well founded; but since, in place of recovering from them in virtue of his interim warrant, he chooses to make his claim out of the funds now under division, he cannot be allowed to state it in any way which will give him a larger proportion of them than the other creditors who did not apply for interim warrants. See App. to Fac. Coll. 17th January 1792, York-buildings Company against Brown; and Fac. Coll. 27th November 1793, Murray against Blair.

The Lord Ordinary "found, That Mr John Dickson was not entitled to impute the partial payments received by David Dickson his cedent, periodically to the interest of his debt."

The Court, on advising a reclaiming petition for David Dickson's trustee, and answers for the creditors, unanimously adhered; "reserving," however, "to the petitioner his claim against General Douglas, the purchaser, and his cautioners personally, in settling with them for the balance of his debt, of imputing the partial payments to the interest due at the time such partial payments were obtained, and the remainder only in extinction of the principal sum contained in his act and warrant; and reserving to the said General Douglas, and his cautioners, their objections thereto, as accords."

POINT II.

RANKING AND SALE.—*Is a creditor in a judicial sale, who obtains an interim warrant, entitled to the expence of extracting it out of the common fund.*

THE trustee for Mr Dickson further claimed, that he should be allowed deduction from the partial payments received by his constituent of the expence of obtaining and extracting the interim warrant; and

Pleaded:

Pleaded: As the interim warrant is in effect a partial decree of division, it should be on the same footing with a total one, the expence of which is always defrayed from the common fund. Besides, if the warrant had not been extracted, the whole proceedings contained in it would have gone into the ultimate general extract; and as the expence of the latter will be proportionally diminished in consequence of the partial extract, the expence of it should, on that account, be allowed.

Answered: The act and warrant contains nothing but the proceedings which took place on the petition applying for it, which Mr Dickson gave in for his own convenience; and as these proceedings would not have taken place if it had not been presented, the expence of extracting them should be defrayed by himself.

Observed on the Bench: Interim warrants should be very sparingly granted, as they frequently occasion much confusion and litigation, and when they are, the whole expence attending them should be defrayed by those creditors who apply for them.

The Lord Ordinary found, that "John Dickson is not entitled to deduce, from the partial payments, the expence
" David Dickson was put to in extracting the act and warrant
" in his favour."

The Court unanimously adhered.

Lord Ordinary *Craig.* For Dickson, *M. Ross.* Alt. *Hay.* Clk. *Menzies.*

R. D.

N° CLVI.

February 4. 1795.

(TEIND COURT.)

WILLIAM FERGUSON,

AGAINST

JOHN GILLESPIE.

TEINDS.—A report of the sub-commissioners approved of, where the value of the lands was ascertained without a proof, by consent of the heritor, patron, and minister; but rejected when it proceeded on consent of the two former only.

A valuation in grain is not held to be derelinqished by payments to the minister in money, of an equal value.

MR GILLESPIE, minister of the parish of Arrochar, having brought a process of augmentation, Mr Ferguson, proprietor of the estate of that name, contended that his teinds were exhausted, and brought a process in order to have two reports of the sub-commissioners relating to them approved of.

At the date of these reports, the estate of Arrochar was divided into Upper and Nether, which belonged to different proprietors.

The report as to Nether Arrochar, dated at Dumbarton, 19th August 1629, bore, that the heritor, patron, and minister, had, in presence of the sub-commissioners, consented that the old rental of the teinds should be held as their value in all time coming.

The report as to Upper Arrochar, dated at Dumbarton, 31st December 1629, stated, that the heritor and patron had given a similar consent, but nothing was said as to the presence or consent of the minister; and in both, the lands had been valued accordingly without further proof. The amount of the whole teinds was fixed at 412 merks in money, and 12 bolls of meal. In practice, no victual had been paid to the minister, and his money-stipend had been L. 30 : 11 : 2, ⁶/₁₂ Sterling. The minister objected to these reports; and

Pleaded: imo, The report as to Nether Arrochar cannot be supported, because no proof was led to ascertain the real value of the lands. The consent of the incumbent for the time cannot bind his successors.

The report as to Upper Arrochar is still more defective. From its mentioning the presence and consent of the heritor and patron,
and

And, upon advising a reclaiming petition and answers, they
“adhered.”

Adv. Rolland, Hay. Alt. W. Robertson, Ar. Campbell junior.

D. D.

N° CLVII.

February 14. 1795.

ROBERT MACINTOSH,

AGAINST

ANNE MARIA BENNET and JOHN B. WILLAMSON.

ADVOCATION—An advocacy is competent where the libel concludes for more than L. 12 Sterling, although the sum awarded should be less.

MACINTOSH brought an action before the Sheriff of Edinburgh, against Mrs Bennet and Williamson, concluding for L. 21, 14 s. besides expence of process.

The Sheriff having found the defenders liable for L. 9, 2 s. Sterling, and L. 1, 10 s. of expences, and the expence of extracting the decree, they presented a bill of advocacy, which the Lord Ordinary refused as incompetent, because the sum *awarded*, exclusive of expences, did not amount to L. 12 Sterling.

In a reclaiming petition, the defenders contended, that the act 1663, c. 9. prohibited advocations only where the sum *concluded for in the libel* did not amount to 200 merks, and that the 20th Geo. II. c. 43. § 38. made no alteration on that statute, further than augmenting to L. 12 Sterling, the sum required to render this mode of review competent; Stair, b. 4. tit. 37. § 4. ; Dict. vol. iii. p. 15. 11th February 1761, Marquis of Lothian against Oliver and Fair; 11th December 1791, Roberts against Duncan *.

On advising the petition, with answers, it was

Observed, That as the right of bringing a cause under review belongs, in all cases, equally to the pursuer and defender, it must be the sum in the libel which ascertains the competency of an advocacy;

* Not collected.

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advocation; for otherwise a pursuer, in consequence of an inferior judge awarding him a sum under L. 12 Sterling, might be deprived of this mode of redress, although what he sued for, and was by law entitled to, greatly exceeded that amount.

The Court found the bill of advocation competent.

Lord Ordinary, *Henderland.* A&A. *Hagart.* A&A. *Connel.*

R. D.

1° CLVIII.

February 17. 1795.

The DAUGHTERS of Alexander Drummond,

AGAINST

The CREDITORS of May Drummond.

ALSA DEMONSTRATIO.—An erroneous description of the ground of debt for which an heritable bond of relief is granted, does not annul the security.

[IN the ranking of Mrs May Drummond's creditors, the daughters of Alexander Drummond, formerly British consul at Aleppo, produced two bonds, for L. 200 each, granted by the said Mrs May Drummond, and their father, to Lady Jean Gordon; the one dated 12th, and bearing interest from the 5th June 1761, and payable at Whitsunday 1762; the other dated 17th September 1762, payable at Whitsunday 1763, and bearing interest from its date; together with assignations to these bonds, in consequence of their having paid them to the creditor. They likewise produced an extract of an heritable bond of relief, dated 11th January 1765, with the infestment following on it, granted by Mrs May Drummond to Alexander Drummond, bearing, that the intention of it was to relieve him of their joint bond for L. 400, granted to Lady Jean Gordon, on the 19th September 1762, and of another debt to a different creditor therein mentioned. Upon this interest they claimed to be ranked as heritable creditors; insisting, that it was evident from the circumstances of the case, that this heritable bond was meant to apply to the two bonds above mentioned; and particularly, that the writer employed to make out the heritable security had been led

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into

into a mistake, in describing the grounds of debt, by Lady Mary Drummond, daughter of and manager for Lady Jean Gordon, who, when applied to by him for information, had sent him the following note, which was preserved by him, and produced as his warrant for executing the heritable security in the terms above mentioned:

“ The bond granted by Mrs May, and the consul, to my mother, is payable to herself, and bears date, as I think, the 19th September 1762, is of L. 400 Sterling, principal, with annual rent due from the date, at 5 per cent.”

The other creditors, besides disputing the evidence of the fact,

Pleaded: Supposing it probable that the heritable bond was meant to apply to the two bonds produced, still no heritable security can be supported, which is not clear and precise in itself, without the aid of extrinsic evidence; Kilk. p. 227. 16th Jan. 1739, Reid against Ker; 6th July 1753, Dalgleish against Hamilton. See also Bruce, 2d February 1715, Ogilvie against Lesly. On this account, the security is ineffectual where the creditor is not named; Home, 7th November 1741, Blackwood against the Representatives of Colvill and Russell, or where the lands, over which it is meant to extend, are not properly described; Home, 23d June 1742, Wallace against Dalrymple. There is still more reason that the debt for which it was granted should be ascertained. When, as in the case of Blackwood, investment is given to the representatives of a particular person, without naming them; or where, as in the case of Wallace, the lands of the debtor are given in security, without describing them, there is an ambiguity to a certain extent; still, however, the security can apply only to a particular description of persons or of lands. But when the debt is not described, and still more when an erroneous description is given of it, although there may be probabilities, more or less strong, there can be no certainty to what debt it relates.

To support the present claim, would weaken the security attending heritable rights. A creditor or purchaser would think himself safe, if there was produced to him, discharged, a bond answering the description given in the heritable security; yet, at the end of twenty or thirty years, when the original parties were dead, two bonds, amounting together to that sum, might be produced; and it might be contended, with the same reason as in the present case, that the heritable security applied to them.

Answered: The heritable security would have been effectual, although it had merely stated, that Alexander Drummond had become cautioner for the granter of it, to the extent of L. 400, without mentioning the document by which the debt had been contracted, the name of the creditor, or its term of payment. It could not even in that case have been reduced as an indefinite security, because its amount, and the person in whose favour it was created, would have appeared on the investment. An error in a
part

part of a deed, which might thus have been with safety omitted altogether, cannot be fatal to the security ; an error in a superfluous addition, even to an essential part of the deed, such as the name of the creditor, would not have had that effect ; Falc. 16th November 1749, Dickie ; Dict. *v. Falsa demonstratio* ; Kilk. 5th July 1743, Hamilton ; Forbes, 16th February 1711, Dickson. Even where there is no error in describing the ground of debt, it may not be altogether clear from the infestment to what debt it was meant to apply. A person, for example, may, at the same time, have become cautioner for another in two bonds of the same dates, to the same creditor, and to the like amount, and the obligation of relief be meant to apply only to one of them. No danger, however, can arise to third parties from an ambiguity of this nature ; as the object of granting an infestment in relief is to secure, not the debt, but the person who has undertaken to pay it, they ought to see the obligation of relief discharged, before contracting on the faith of a subject over which a right of this sort apparently exists.

The Lord Ordinary “ found it instructed by the two bonds for “ the principal sum of L. 200 Sterling each, the one dated the “ 12th day of June 1761, and the other the 17th September 1762, “ granted by the said May Drummond and the said Alexander “ Drummond to the said Lady Jean Gordon, and by the discharge “ and assignation of the said two bonds, granted by the said Lady Jean Gordon to the said Christian, &c. Drummonds, dated “ the 2d June 1772, that a just and onerous debt, to the amount, “ in whole, of L. 400 Sterling of principal, with interest and penalty, had been contracted by the said May Drummond to the “ said Lady Jean Gordon, in which Consul Drummond was bound “ with her, prior to the said heritable bond of relief, and which “ was paid by the claimants, as his representatives, after his decease : Found it is neither proved nor alleged, that there was “ any other debt due to the said Lady Jean Gordon by the said “ May Drummond, in which Consul Drummond was bound with “ her at the date of the said heritable security, besides the L. 400, “ contained in the said two moveable bonds of L. 200 each ; and “ that the said heritable security must have been granted for Consul Drummond’s relief thereof, although, through misinformation or error in the description of the original ground of debt, “ the same was said in the heritable security, to have been constituted by one bond for L. 400, instead of two bonds for L. 200 “ each ; and therefore found, that the claimants Christian, &c. “ Drummonds are entitled to hold the said heritable security for “ relief of the said debt of L. 400 principal, with the interest and “ penalty due thereon, and ranked and preferred them accordingly.”

A reclaiming petition was (18th November 1794) refused without answers.

A second petition was appointed to be answered; and at advising the cause, a considerable diversity of opinion arose as to the effect of the erroneous description. On the one hand, it was observed, that in cases relating to heritable rights, the will of parties can be carried into effect only in so far as it is expressed *habili modo*; and that as this was a question among creditors, and as, in consequence of the blunder in the description, extrinsic evidence became necessary to support the infestment, the claim could not be sustained. On the other hand, a majority of the Court thought, that as the object of the transaction was not to secure the debt itself to the original creditor, but only to give security for relief to the cautioner, it was not necessary that the bond of relief should describe with precision the ground of debt for which it was granted; and that as the identity of the debt was established, and the name of the creditor, and extent of the heritable security, appeared upon the record, no harm could arise from the erroneous description.

The Lords, by a narrow majority, “ adhered.”

Lord Ordinary, *Esgrove*.
Clerk, *Menzies*.

A& R. *Craigie*,

Alt. *M. Ross*.

D. D.

N° CLIX.

February 19. 1795.

D A V I D P E T E R,

A G A I N S T

T H O M A S R O S S and others.

WRIT.—*An execution of poinding, consisting of more sheets than one, sustained, although one page of it, which contained nothing material, was not signed by the messenger, and another not signed by the appraisers.*

THOMAS Ross, and other creditors of John Macomish,* having poinded some spirits in his possession, the validity of the poinding was objected to by David Peter, who pretended to have obtained a right to them from the common debtor.

The Sheriff having sustained the poinding, David Peter brought an advocacy, and also a reduction of the execution, which consisted

fisted of more sheets than one, because one of the pages of it (which, however, contained nothing material) was not signed by the messenger, and another not signed by the apprisers.

Pleaded for the pursuer: It seems to have been the intention of the Legislature to put the executions of messengers, in so far at least as relates to the subscription of the parties, on the same footing, in point of solemnity, with private deeds. When formerly the latter were authenticated by the seal of the granter, which, when the deed consisted of more sheets than one pasted together, was affixed to each of the joinings, the act 1469, c. 32. ordered messengers to fix their seals to their executions; and although it is not expressly said so in the act, it must have meant, that where the execution consisted of more sheets than one, the operation should be repeated in like manner. Afterwards, when the act 1540 required, that private deeds should be authenticated by the subscription of the granter, which in practice was interpreted to mean, that the subscription should be repeated at each of the joinings, the act 1686, c. 4. made the want of the subscription of the messenger a nullity in an execution; and there being the same reason for giving an extensive interpretation to this statute as to that of 1540, it must have been meant, that an execution in the old form should be subscribed in the same manner. The act 1696, c. 15. allowed "contracts, decreets, dispositions, extracts, transumps, and other securities," to be written bookwise, provided "every page be marked by the number first, second, &c. and "signed as the margins were before." And although, strictly speaking, perhaps this statute does not apply to executions, or other public instruments, practice has likewise extended it to them. See Thomson's Duty of Messengers, p. 30. Accordingly, although the act 1696 does not mention seifins, it has been considered as virtually repealing the act 1686, c. 17. in so far as it requires every page of a seifin to be signed by the witnesses, but does not require the pages to be numbered, Ersk. b. 3. t. 2. § 16. Indeed, as the act 1696 is the only authority for writing executions bookwise, if it does not apply, the execution is null, because it is not written in the old form. The execution being therefore, in either view, defective in point of legal solemnity, it cannot be supported, however immaterial the defect may be to the substance of the deed; Dict. vol. i. v. Execution, p. 266.

The Lord Ordinary repelled the reasons of reduction.

A reclaiming petition was (29th January 1795) refused, without answers.

A second reclaiming petition having been presented, it was

Observed on the Bench: The act 1686, c. 17. does not require every page to be subscribed, but every leaf; and even the act 1696 (if it applies to executions), is not very explicit on the subject. It ordains pages to be signed, "as the margins were before;"

“ fore ;” but the sole object of signing at the margins was to prevent one sheet from being fraudulently substituted in place of another. And the act 1696 cannot reasonably be supposed to have meant any thing more, than that each sheet or piece of paper should be subscribed for the same purpose. See *Kilk.* p. 6c8. 21st December 1742, *Williamson against Williamson*; *Dict.* vol. ii. p. 544.; vol. iii. p. 471. Besides, the pages which are not signed in the present case contain nothing material to the execution. See *Dict.* vol. ii. p. 534.

The Lords also refused this petition, without answers.

Lord Ordinary, *Ankerville.* For the Petitioner, *Dean of Faculty Erskine, Hagart.*
Clerk, *Gordon.*

D. D.

N° CLX.

February 24. 1795.

The COMMON AGENT in the Ranking of Polquhairn,

AGAINST

ANDREW CORRIE.

PROCESS.—*The Court may allow a decree, cognitionis causa, to be extracted before it is read in the minute-book.*

MR CRAWFURD NEWALL having died, leaving his affairs in disorder, Andrew Corrie, his creditor in a bond for L. 250, after charging his heir to enter, brought an action of constitution against him on the passive titles, containing also a conclusion for adjudication *contra hereditatem jacentem*, in case he should renounce, which he having done, Corrie, on the 16th February 1791, obtained a decree *cognitionis causa*.

Next day he presented a petition, which was intimated to the heir apparent, and all concerned, stating, that adjudications had been led against the estate of Polquhairn, so far back as the 25th February 1790; and therefore praying the Court “ to dispense with the reading of the decree of cognition in the minute-
“ nute-

Parliament, where equity suggests the propriety of deviating from it, yet it would be dangerous to yield too far to this doctrine, especially in competitions of creditors; but as a decree *cognitionis causa* contains no personal conclusion, this case does not fall under the spirit of the act of federunt, the sole object of which was, to give the unsuccessful party time to apply for an alteration of the judgment before the decree is extracted.

One Judge thought the decree came under the words of the act of federunt; and that as dispensing with the minute-book would affect the interest of the other creditors, the Court were not entitled to interfere. The only cases, in his Lordship's opinion, in which they could do so with effect, were those where no third party was in any way hurt by the dispensation.

The Court, with only one dissenting voice, "adhered."

Lord Ordinary, *Dunfinnan*. For the Common Agent, *Geo. Fergusson*, *M. Rafi*.
Alt. Mortbland. Clerk, *Pringle*.

R. D.

N° CLXI.

February 25. 1795.

Sir JOHN SCOTT,

AGAINST

The HERITORS of the Parish of Ancrum.

TEINDS.—*When a titular or patron brings an action, in order to have his right to teinds ascertained, and claims arrears for forty years back, a colourable title of possession is sufficient to defend the heritors against payment of those which became due prior to the decree in the process of declarator.*

SIR JOHN SCOTT having brought an action against the heritors of the parish of Ancrum, concluding to have his right to the teinds ascertained, and also claiming arrears for forty years back, he produced as his title, *imo*, A contract of marriage in 1675, in which

which John Scott of Ancrum conveyed to Patrick Scott, his son, the lands and barony of Ancrum, "with the advocacion, donation, and right of patronage of the kirk and parochin of Ancrum, parsonage and vicarage teinds thereof:" 2do, A Crown-charter in 1676, confirming the contract, and conveying the lands, cum advocacione, donatione, et jure patronatus ecclesiæ et parochiæ de Ancrum, decimis rectoriis et vicariis ejusdem." He farther stated, that a similar clause occurred in all the subsequent titles to the estate; that he or his predecessors had, for a century back, uniformly presented the minister on every vacancy, though, for time immemorial, no demand had been made by them against the heritors for payment of teinds.

The defenders, on the other hand, produced a number of discharges from the different ministers of the parish. The style of these discharges was by no means uniform: In some of them, the payment was accepted in full of the stipend or teind due to the minister; in others, as in full of "the teinds of the lands; and in three discharges granted to one heritor, as "in full of the tack-duty." There was, however, no other evidence that a tack had ever existed.

The heritors farther maintained, 1mo, That from the decision 29th February 1680, Scott against the Archbishop of Glasgow, reported by Lord Stair, it appeared, that in 1676 the patronage of the parish of Ancrum belonged to the Archbishop, and consequently that the Crown-charter, granted to the pursuer's predecessor in that year, was null; and that as, at the Revolution, the rights of the Bishops had been annexed to the Crown, the pursuer could not have acquired any right subsequent to that period, unless by act of Parliament, or at least a new grant from the Crown.

2do, That the charter 1676 was meant to convey the patronage, but not the teinds of the parish; Kilk. v. Teinds, 4th December 1748, The Marquis of Annandale against Irving.

3tio, They founded on the authority of Keith; the decision 29th February 1680, reported by Stair; a decree of reduction of certain valuations obtained at the instance of Mr James Scott, designed "Parson of Ancrum," dated 24th July 1667; and the discharges produced, as establishing, that the parish of Ancrum was a parsonage; and they, therefore, contended, that the pursuer, who at best was only patron of the parish, had no right to the teinds, as he had not complied with the regulations of the acts 1690, c. 23.; 1693, c. 25. by getting a competent stipend modified to the minister.

4to, They insisted, that whatever might be said as to the pursuer's right to the teinds in time to come, the circumstances of the case were sufficient to put them *in bona fide* to believe, that their teinds were liable to no other burden than the accustomed payment to the minister, and consequently that the claim for arrears was ill founded; Bankton, b. 2. tit. 8. § 141.; Dict. Tack, p. 427. Earl of Athole against Robertson; Dict. vol. i. p. 110.; 25th June 1731, Sterling against the Feuars of Denny.

The pursuer

Answered: 1mo, The decision between Scott of Ancrum and the Archbishop of Glasgow relates to the patronage, and not to the teinds of the parish. At any rate, the pursuer's progress since the Revolution is sufficient to give him a title to both; for, as patronages and teinds were not annexed, the Crown may make grants of them without the authority of Parliament; Kames, Sel. Decis. No. 72. Donaldson against the Officers of State; 22d February 1783, Murdoch against Gordon; Erskine, b. 2. tit. 10. § 23.

2do, Except in the case of Kirkpatrick-Fleming, which was an erroneous decision, charters containing clauses similar to that in the charter 1676, have been uniformly understood to convey the teinds as well as the patronage of the parish; Kames, Sel. Decis. p. 55. 1753, Spalding against the Heritors of Kirkmichael; January 1763, Heritors of Dalry against Blair*; 6th June 1792, Ogilvie against Scott.

3tio, Admitting that the parish of Ancrum was at one time a parsonage, the regulations of the acts 1690 and 1693, apply only to those cases where the teinds have not been heritably disposed away from the parsons prior to their dates, and where the person claiming the teinds derives his right altogether from those statutes, and not to cases like the present, where the pursuer had a right prior to, and independent of them; and even if he were claiming under these acts, it would be *jus tertii* to the defenders to object, that a stipend had not been regularly modified to the minister of the parish. They have no interest in the matter, farther than that they pay no more than the amount of their teinds. Even the minister could not state the objection; for, provided he have a sufficient stipend, it can make no difference whether it is derived from immemorial use of payment, or from a regular decree of modification and locality.

4to, A colourable title of possession will no doubt liberate from a claim of arrears; but the defenders have no such title. They have no right themselves to the teinds; and from the payments made to the minister, they had no reason to believe that they were exhausted. The greater part of the discharges bear, to be for stipend or teinds due to the minister: And although it may be true, that where a titular or patron has been accustomed, for a series of years, to receive from the heritors an annual payment, inferior to the real value of the teinds, no claim for arrears will be competent at his instance, although his right to a higher sum should be afterwards ascertained, because the heritors had good reason to believe that no such claim lay against them; yet a payment made to one person cannot hurt the interest of another claiming on a different ground; Fount. 30th June 1698, Bruce against Arnot; Kilker. p. 555, Smith against Oliphant.

The Lord Ordinary found, "That Sir John Scott is titular of the parish of Ancrum, and that he has a right to the bygone teinds of that parish for thirty-nine years last past, except in so far

* Not collected.

“ far as the defenders can instruct that they have paid over the
 ‘ same to the minister of the said parish.”

Upon advising a reclaiming petition and answers, it was

Observed on the Bench: The pursuer has right to the teinds in question, either as titular or patron. It will be time enough to determine under which character he holds them, when a sale of them is brought in the proper Court.

Claims for arrears of teinds are extremely unfavourable. If the demand had been made in proper time, the heritors would, in all probability, have purchased their teinds. Any title of possession, therefore, sufficient to put them *in bona fide* to suppose that they were not liable to a claim of this nature, is always sustained as a valid defence against it; and such the circumstances of this case, and particularly the terms of the discharges produced, afford to the defenders. The only difficulty is, whether the pursuer's right should commence from the citation in this action, or only from the date of the judgment pronounced in it. In the case of the Earl of Selkirk against Macmoran, Kames Select. Decis. the Court at first found, (7th December 1763), that an heritor possessing his teinds on tacit relocation, was liable for their full value from the date of the citation in an action brought by the titular in order to interrupt it. A reclaiming petition was, however, presented against this interlocutor, and the Court found (1764) that the interruption only took place from the date of the judgment. A similar decision was given, 14th November 1765, Earl of March against Leishmans.

Even when the heritors have no such defence as occurs in the present case, it is always very difficult for the titular, in an action for arrears, to ascertain the extent of his right. It is incumbent on him to establish what was the actual amount of the teinds each year; for he is not entitled to substitute, in its place, those calculations and conversions which have been introduced in favour of heritors, in processes of valuation.

The Lords unanimously “ Found it unnecessary, *in hoc statu*, to
 “ determine whether the respondent (pursuer) is titular or patron
 “ of the parish of Ancrum: Found the petitioners (defenders)
 “ liable to the respondent in payment of the teinds of their lands
 “ from and after the date hereof; but sustained the defences in
 “ so far as regards bygone teinds previous to the date of this in-
 “ terlocutor.”

Lord Ordinary, *Henderland*. A&T. *Tait*. Alt. G. *Fergusson*. Clerk, *Pringle*.

D. D.

N° CLXII.

(TEIND COURT.)

N^o CLXII.February 25. 17 *9*

JOHN LESLIE,

AGAINST

The Earl of KINTORE, and others.

TEINDS.—*When an estate is let to a general lessee at an undervalue, the rent paid by the tenants to him, and not that paid by him to the landlord, is to be taken as the rule in a process of valuation.*

PETER LESLIE GRANT, in 1769, granted to David Orme, writer in Edinburgh, what is called an *over-lease*, for seventy-six years, of the whole estate of Balquhain, which he possessed as heir of entail.

John Leslie, now proprietor of that estate in the same character, having brought a valuation of his teinds, contended, that the rent paid by the general lessee must be taken as the value of the lands, and which rent, though now inadequate, he alleged, was a fair and equal one at the date of the lease.

The Earl of Kintore and others, objected, That the lands had been let to Mr Orme greatly below their value, as the only means Mr Leslie Grant had of indemnifying him for the large advances he had made, and the general assistance he had given him in asserting his right to the estate: And farther,

Pleaded: Before teinds are valued, the titular is entitled to draw them in kind. The valued teind-duty being the substitute for them, it should be ascertained according to the real value of the lands. When they are let directly to the person who is to occupy them, the rent will be presumed to be their real value: But as, on the one hand, it is a fifth of the constant rent "which ilk land pays," which the Legislature has declared payable to the titular, and the landlord is not liable for a rise of rent recently obtained, because it may not be permanent; so, on the other, the titular cannot be affected by the landlord's keeping the rent of the lands below its natural rate, whether by taking grassums, *Kilker. v. Teind*, No. 4. 6th February 1745, Sir John Maxwell against the College of Glasgow; or by laying a part of the rent

on

N° CLXIII.

March 3. 1795.

WILLIAM-DANIEL-ARTHUR FRANK, and his TUTOR
ad litem,

A G A I N S T

JAMES FRANK and Others.

WRIT.—1681, c. 5.—*A deed, ex facie regularly executed, sustained, although one of the instrumentary witnesses, when examined ex intervallo, deponed, that he did not see the granter subscribe, nor hear him acknowledge his subscription.*

It is not essential, in point of solemnity, that the witnesses should subscribe in presence of the granter, or that the deed should never be out of their sight, in the interval betwixt his and their subscriptions.

IN the reduction of the settlement of the estate of Bughrig, executed by Charles Frank on the 8th February 1791, the instrumentary witnesses were examined soon after the interlocutor of the 10th July 1793 *, allowing their evidence to be taken; and the proof on the whole cause being concluded, a hearing in presence took place, when the pursuer, besides endeavouring to establish that Charles Frank was in such a state of mental imbecility as to be incapable of making a settlement, contended, that the deed was defective in point of solemnity:

1mo, Because one of the instrumentary witnesses did not see the granter subscribe, nor hear him acknowledge his subscription.

2do, Because the instrumentary witnesses did not subscribe in presence of the granter, but in an adjoining room, and after the deed had been for some minutes out of their sight, and in possession of the writer of it.

Besides the granter, who was confined to bed, the persons supposed to be present at the execution of the deed, were the writer and instrumentary witnesses; a maid-servant was likewise at the door of the room. Of these, Tod, one of the witnesses, and servant to the granter, deponed, That he did not see him subscribe, nor hear him acknowledge his subscription; that just as he was entering the room, and before he had got far enough to be able, from the situation of the bed, to see the granter, he was desired by the
 writer

* See No. 70.

Rollands; Dict. vol. iii. p. 467. *v. Writ*; Fount. 6th December 1695, *Elliot*s against *Riddell*; and in mutual contracts, Dict. vol. ii. p. 542.

Answered: The solemnities required in the execution of deeds depend entirely on statute-law, there is therefore no reasoning by analogy from the laws of one country to those of another. In England, an express statute (29th Cha. II. c. 3. § 5.) has established, that the witnesses must in certain cases subscribe in presence of the granter; and if the same had been intended by the act 1681, it would have expressly declared so. All that that statute requires, however, is, that the witnesses should see the granter subscribe, or hear him acknowledge his subscription: Accordingly, in practice, it is not understood to be essential, that deeds should be subscribed by the witnesses in presence of the granter. On the contrary, it is very common, in cases where there are several parties to a deed, for the man of business to put it into the hands of two of his clerks, who carry it round to the different parties, and after getting it signed by them *seriatim*, subscribe themselves as witnesses once for all to the whole subscriptions.

The Court (one Judge only excepted) were clearly of opinion, that Mr Frank was capable of making a settlement; that the deed under reduction was executed agreeably to his intention; and that no improper means had been taken to obtain it. Indeed none of the persons favoured by it resided near the granter, or knew any thing of its execution.

On the other objections, it was

Observed on the Bench: When a deed is *ex facie* regularly executed, there arises a strong legal presumption in its favour; and it lies upon him who attempts a reduction of it, to establish his objection by legal evidence. Judging from the whole circumstances of this case, it is not proved that Tod did not see the deed under reduction signed by Mr Frank. On the contrary, it rather appears that he was in the room, and in a situation where, if he had chosen, he might have seen him subscribe it. It must therefore be presumed, notwithstanding his deposition, that he did so. It would be extremely dangerous to set aside a deed, *ex facie*, fairly and regularly executed, upon the evidence of an instrumentary witness, unless it be completely corroborated by other circumstances, particularly when that evidence is given *ex intervallo*, and when a wrong account of the matter, whether from design or want of recollection, may be suspected.

The act 1681 does not require, in point of solemnity, that the instrumentary witnesses should subscribe in presence of the granter, or that they should not lose sight of the deed in the interval betwixt his and their own subscriptions; nor has it been so understood in practice. The presumption of law is, that witnesses will not subscribe a deed unless they are satisfied of its identity; and although

there never ought to be any considerable interval ; yet, when such a case occurs, it must be judged of upon its whole circumstances.

The Lords, (4th December 1794), by a great majority, “ re-
“ pelled the reasons of reduction ;” and on advising a reclaiming
petition, with answers, they “ adhered.”

Lord Ordinary, *Eskgrove*. A&L Lord Advocate Dundas, Dean of Faculty Erskine,
W. Erskine. Alt. Solicitor-General Blair, Geo. Fergusson, W. Murray.
Clerk, Menzies.

D. D

N^o CLXIV.

March 3. 1795.

VISCOUNT ARBUTHNOTT.

AGAINST

JOHN DOUGLAS.

PRESCRIPTION.—*Act 1772, c. 72. § 37. A decree of constitution, obtained by the debtor in a bill, within six years from its date, against a person bound to relieve him, found not to interrupt the sexennial prescription in favour of the creditor in the bill, although he had been examined on the verity of his debt in the process of constitution, and had on that occasion produced his bill.*

IN 1770, Mr Douglas, on his son's marriage, conveyed to him the lands of Tilwhilly, under burden of his debts, and reserved to himself the lands of Inchmarlo, free of all burden.

In 1772, he delivered to his son a list of his debts ; but no steps were taken to authenticate it, as relative to the son's obligation. The son died in 1773, leaving the present Mr Douglas of Tilwhilly in infancy.

The list of debts was found in his repositories, marked in his own hand-writing, “ List of Debts, Tilwhilly elder, 1772.”

In that list, the late Viscount of Arbuthnott was marked as a creditor for L. 6000 Scots, or L. 500 Sterling, and a Mrs Reid for L. 1800 Scots, or L. 150 Sterling.

In 1775, Mr Douglas of Inchmarlo brought an action against his grandson, narrating the facts above stated ; and concluding, that he should be ordained to relieve him of the debts contained in the list.

The Court allowed the different creditors to be examined on oath as to the verity of their debts.

Mrs Reid declared, that the debt due to her had been paid by the pursuer.

The Viscount of Arbuthnott, at his examination, produced as his grounds of debt, two bills, the one for L. 521, 5 s. dated 28th September 1774, payable at Whitsunday 1775 ; the other, for L. 156, 15 s. dated 26th May 1774, and payable in twelve months.

The Viscount deponed, that the first of these bills had been granted for a debt of L. 500 contracted in 1769, the surplus in the bill being the interest due at its date ; and that the second had been granted on account of money advanced to discharge the debt due to Mrs Reid. Both bills were immediately returned to the Viscount.

In 1778, a judgment was pronounced, finding the pursuer entitled to payment of such of the debts as he had discharged since the date of the list, (among which that due to Mrs Reid was mentioned, but no notice taken of Lord Arbuthnott's having succeeded as a creditor in her place), and obliging the defender to relieve him of those debts which were still unpaid, among which the debt of L. 6000 Scots to Lord Arbuthnott was ranked, but no notice taken of the bill which had been granted for it.

Mr Douglas of Inchmarlo died in 1791, and the late Viscount of Arbuthnott about three months after him.

The two bills above mentioned having been found in his possession, and without any marking of payment of interest on the back of them, the present Viscount of Arbuthnott brought an action against Mr Douglas of Tilwhilly, (who represents his grandfather), for payment of them, in which the points at issue came to be : *1mo*, How far, from the circumstances of the case, these bills must not be presumed to have been paid : *2do*, How far, independently of this presumption, all claim on them was not cut off by the sexennial prescription.

On the first point, both parties founded on the general conduct and situation of their predecessors, and various pieces of evidence in support of their plea.

On the second point, the pursuer

Pleaded : Prior to the act 1772, the Court were accustomed to deny action on bills of an old date, merely from the presumption arising against them from the long taciturnity of parties ; but what number of years was necessary to afford room for this presumption depended on the circumstances of each case. The sole object of the statute was to fix the period which should be required for this purpose. And as the presumption of common law applied only where there was a complete taciturnity on both sides, so the act of Parliament applies only in the same circumstances. Wherever this taciturnity has not taken place, and the parties have in
any

any way acknowledged the subsistence of the debt, by a partial payment, a marking of interest on the back of the bill, a discharge for it granted on a paper-apart, or otherwise, the Court are called on to judge of the effect of these circumstances, in the same manner as before the date of the statute. That this was its meaning, is evident from the distinction which it makes between the *bill* and the *debt* for which it is granted; the former it declares to be at an end upon the lapse of six years, without diligence being done, or action commenced on it; while it allows the debt, even after that period, to be proved by the writ or oath of party. And still more must the case be taken out of the statute, where the debtor has expressly acknowledged the debt during the currency of the six years.

Now the decree of constitution, in this case, if not a document of debt in favour of the creditors, is at least an acknowledgement of the subsistence of their debts. In that action, though the creditors were not nominally parties, they were materially interested. It was no doubt commenced in order to prevent them from insisting on payment from their debtor, on seeing him give up so great a part of his property. By means of it, they got two debtors instead of one. After its date, they might have brought a direct action against the present defender for payment, although he had not represented his grandfather, who, in fact, held the decree as trustee for his creditors, who consequently are entitled to the benefit of it without the formality of an assignation.

Answered: The act 1772 declares, That no action shall lie on a bill, after six years from its date have elapsed, unless, in the mean time, diligence has been done, or action commenced on it; reserving to the creditor, after that period, to prove resting owing by the writ or oath of the debtor. In this case, twice the period of prescription had elapsed before a claim was made, during which no steps were taken to enforce payment, and no writ of the debtor is produced.

The sole object of the action of constitution was to authenticate the list of debts. The creditors were examined in it merely as havers. Betwixt the date of the list, and the commencement of the action, some of the debts had been discharged: by the decree, Mr Douglas of Inchmarlo was found entitled to payment of those in that situation, and to relief from the rest. In the list, only one debt of L. 6000 Scots is stated as due to Lord Arbuthnott; and although it appeared from the proof, that the debt due to Mrs Reid had been discharged with money borrowed from the Viscount, the decree takes no notice of that transaction, nor indeed of either of the two bills now claimed on. And although it had, that circumstance would not have affected the present question.

Prescription may be interrupted, either by a claim made by the creditor for payment, or by the acknowledgement of the debtor. A claim to have that effect, must be judicial. And it has been found, even that a decree of registration, a horning without a charge, (Dalr. 11th December 1717, Wright against Wright), or the production of a ground of debt in a reduction-improbation, that
action

action being carried no farther, (9th March 1756, Hay against his Majesty's Advocate *,) are insufficient for that purpose. In the present case, no claim was made by the creditor. And with respect to the supposed acknowledgement of the debtor, although any act of acknowledgement will interrupt the long prescription, the short prescriptions can only be interrupted by a writing, which proves resting-owing, and constitutes in itself a valid document of debt. Hence, a partial payment, or a marking of interest, will not have that effect. The reason of the distinction is, that the former proceeds on presumed dereliction; whereas the latter are founded on the jealousy of the law against informal obligations, and the consequent presumption, that parties will not allow them to stand long over. The decree in question would not have interrupted even the long prescription. It was *res inter alios* to the creditors; it might have been discharged gratuitously without their consent, and was no better than a decree by one obligant against another, by which the right of the creditor cannot be affected.

The Lord Ordinary reported the cause, on informations.

The Court, (13th February 1794), "having considered the whole circumstances of the case, particularly the decret of constitution of the late Tilwhilly's debt;" repelled the defences.

Upon advising a reclaiming petition, with answers, it was

Observed on the Bench: The sexennial prescription may be interrupted, like every other, by the debtor's acknowledging the subsistence of the debt during its currency. An indefinite partial payment within the six years may not have this effect, because it affords no evidence that the rest of the debt was then due. It may have been extinguished by compensation or otherwise. But a payment of the interest during the currency of the six years will interrupt the prescription, as affording evidence that the whole principal sum of the debt was then due. If, for example, such payment of interest should take place only a day or two before the lapse of the six years, the act certainly would not apply, as the Legislature could not have meant to introduce a prescription of a week or a day.

The decree in 1778 is to be considered as a judicial acknowledgement on the part of the debtor, that the debt now claimed was then due. The currency of the prescription, therefore, was interrupted by it, and the effect the same as if a new bill had been granted of that date; but, as the debt thus renewed is still constituted only by bill, a new period of prescription, of six years, began to run from the date of the decree, upon the same principle which was followed in a case of the septennial prescription

* From the report of this case in the Faculty Collection, it would appear that the contrary was found; but from what passed on the Bench, when the present case was advised, it is believed that that report is erroneous.

prescription reported by Bruce, 19th January 1715, Gordon; and as more than six years elapsed between the date of the decree and the commencement of the present action, the bills in question are prescribed.

But the general opinion of the Court seemed to be, that the bills were prescribed on a different ground. Nothing interrupts the sexennial prescription, (it was observed), in terms of the act 1772, except diligence or action raised on the bill, within six years from its date. No acknowledgement of the debtor within the six years, whether by payment of interest, or otherwise, can have that effect, unless it be such as would of itself constitute a valid obligation against the debtor.

Even supposing the decree of constitution had been obtained after, in place of before the lapse of the six years, the creditors were not parties, and are not entitled to found on it. It was intended solely for behoof of Mr Douglas of Inchmarlo, and would have been equally necessary, although he had himself, before that time, paid the whole debts. And although the debts were still outstanding, he might, on receiving payment from his son, have liberated him from the obligation of relief, and converted the money to his own use. He might even have discharged the obligation gratuitously, if by doing so he did not render himself insolvent.

The Lords (18th November 1794) "sustained the defence of the sexennial prescription."

Upon advising a second reclaiming petition, with answers, a doubt was expressed, how far the decree did not support the debt for 40 years; but the Lords, by a considerable majority, "adhered."

Lord Ordinary, Henderland. A.G. Lord Advocate Dundas, John Dickson. Alt. Solicitor-General Blair, M. Ross, Neil Ferguson, Tait. Clerk, Gordon.

D. D.

action being
his Majesty
the King
N° CLXV.

March 3. 1795.

Lord FREDERICK CAMPBELL, Lord Clerk-Register of Scotland,

AGAINST

ANDREW STUART, Keeper of the General and Particular Register of Seifins at Edinburgh.

PUBLIC OFFICER.—*IMO, The right of appointing the keeper of the general register of seifins belongs to the Crown, and not to the Lord Clerk-Register.*

2do, The Lord Clerk-Register has the right of marking the books of the general register, and of all the particular registers of seifins, and is also entitled to the ultimate custody of them.

THE Lord Clerk Register was originally clerk of Parliament, and of the other great courts and councils, in which capacity he had the charge of the public records; and as clerk of the Court of Session, a variety of records were by special statutes put under his care, 1597, c. 265, 1600, c. 13, 1696, c. 19.

Independently, too, of any statute, as the King's great clerk, he was the keeper of all records, the custody of which was not otherwise provided for. In this way, the artillery and army accounts, books of the expence of the King's works, books of rates, and many other papers of the like sort were transmittted to him. Almost all records, too, of a judicial nature, such as notaries protocols, Sheriffs-books, and the like, were sent to him at stated periods, for preservation.

In former times, all those records were deposited in the castle of Edinburgh, and more recently in the apartments below the Parliament-house, whence they have been very lately removed to the New Register-office.

After various ineffectual attempts to establish a record of seifins, and other writs relative to feudal property*, the act 1617, c. 16. was passed, placing the registers of seifins on their present footing, and intrusting the care of them to the Lord Register. This statute, after enacting that there shall be a public register, "in which
"all reversions, regresses, &c. shall be registrate, statutes and ordains the said registers, and registrations foresaid, to be insert
"therein,

* See 1503, c. 89.; 1540, c. 79.; 1555, c. 46.; also two unprinted statutes in 1599 and 1604; Acts of Sederunt, (Edinburgh 1790), p. 29. and 35.

herein, to appertain and belong to the present Clerk of Register, and his deputes, to be appointed by him to that effect, and decerns and ordains the same registers to be *annexed* and *incorporate* with the said office; and that the Clerk of Register present, and to come, have the said office as an proper part and pertinent of the Clerk of Register his office, make and constitute particular deputes, one or moe, for all the days of their lifetimes, or other ways as he shall think expedient, of good fame, literature and conversation, for whom he shall be answerable, and who shall be resident within the towns and places after specified, at all times, to receive from the parties their evidents, and to registrate the same, &c.; and the said registers to be filled up by the *said deputes*, to be marked by the Clerk of Registers, and *his deputes* to be appointed by him *to that effect*, with an note of the particular number of leaves that the same shall contain; and the said registers, after filling up of the same, to be reported to the said Clerk of Register, to remain with him and *his deputes*, and to be patent to all our Sovereign Lord's lieges, and extracts thereof to be given by him, and his deputes to be appointed by him, during all the days of their lifetime, or other ways as he shall think expedient to that effect, to all who shall have ado with the same," &c. The statute then enumerates the different places where these registers were to be kept, and among the rest "one in the burgh of Edinburgh, for the whole lands lying within the bounds of the Sheriffdom of Edinburgh principal, constabularie of Haddington, Linlithgow, and Bathgate." The act then proceeds, "or in any other place or places more convenient, as the Clerk Register shall think most expedient, due intimation being made to the lieges of the same, and the said evidents to be registrate in the particular books appointed for the lands within the bounds of ilk Sheriffdom, stewartrie, and bailliarie as said is, or in the option of the party *in the books of register kept by the said Clerk Register himself, or his deputes* to be appointed by him, during all the days of their lifetime, or other ways as he shall judge expedient to that effect *in Edinburgh* *."

After the passing of this act, the Lord Clerk Register had the following appointments in his gift: The keeper of the general register of seilins; and the keepers of the twenty particular registers; principal clerks of session; the clerks to the commission of teinds;

Whether what is now called the *General Register* of Seilins was first established by this Act, seems to be somewhat doubtful. From the manner in which the latter part of the Act is expressed, it may be thought that there was such a record then existing; and, notwithstanding the difference of phraseology, it is not impossible that it may have been no other than the books of Council and Session, in which, from the unprinted acts 1599 and 1617, it appears that the registration of the documents, mentioned in the statute 1617, was competent: On the other hand, the following doquet, prefixed to the first book of the general register, which commences 28th June 1617, affords a pretty strong ground for concluding, that this register, (at least in its present form), owes its origin to the statute 1617: At Edinburgh, upon the days after specified, the writs and evidents following were produced, and registrate in this buik, being the first buik of the register, or session, appointed for registration of sasines, reversions, and other writs, *conforme to an acte of Parliament, made in the month of Junii, 1617 years*, be Mr Francis Hay, depute-keeper thereof, and his servants at his command."

teinds; the keeper of the minute-book of the Court of Session; the keeper of the general register of hornings and bills; and the clerk to the admission of notaries; and he continued long to enjoy this extensive patronage. The commissions, however, granted to the different Clerk Registers, from 1677 till very recently, were during pleasure only, (and the same indeed was the case, except in one instance, with the commissions before the 1677), which might have some effect in restraining any improper exercise of his power in disposing of these offices.

Occasional instances also occur, at an early period, of the Crown reserving the right of nomination as to some of them.

In 1676, during a vacancy in the office of Clerk Register, the King, by a letter addressed to the Lords of Session, (*Acts of Sederunt*, p. 124. Edin. 1790), bestowed the right of appointing the clerks of session on the Court itself. And, accordingly, when Sir Thomas Murray was made Clerk Register in November 1677, his commission, though it contained the power in general of naming deputies, bore the following limitation: "*Demptis duntaxit locis trium ordinarium clericorum Concilii et Sessionis, quos nos hac tenus ordinavimus, in posterum locari per Dominos nostræ Sessionis.*" But afterwards, in 1680, this right was restored to him, as appears from the King's letter to the Court, (*Acts of Sederunt*, p. 146.) which explains the motives for returning to the former practice.

In the commission to Sir George Mackenzie, Sir Thomas Murray's successor, power is given him to name all deputies whatever. But in 1689, the office of Lord Clerk Register was bestowed on Lord Burleigh, (then Master of Burleigh), and four others, and their commission bore the following reservation: "*Reservan. nobis solam potestatem nominandi et constituendi omnes in dicto regno clericos, de dict. officio pendentes.*"

Lord Burleigh and his colleagues remained only three years in office. Lord Tarbert in 1692 was appointed sole Clerk Register, and his commission, and every subsequent one till 1728, contained the power of naming deputies without any limitation.

In 1716, Lord Marchmont, (then Lord Polwarth), was appointed Clerk Register during pleasure, with the usual powers of deputation, and with a salary of L. 444, which had been in 1708 granted for the first time to Lord Glasgow, then Clerk Register, and continued to his successors.

In 1728 the salary was raised to L. 1200, and a new commission, also during pleasure, was granted to Lord Marchmont, in which the right of naming all the subordinate officers *was reserved to the Crown*, in the same terms which had been used in the commission to Lord Burleigh and his colleagues in 1689.

Ever since that period the commissions have borne the same reservation. Prior to 1771, they have also been granted during pleasure, and with the same salary of L. 1200, except in the case of Mr Hume Campbell, who held the office for life, with a salary of L. 1600.

Lord

Lord Frederick Campbell has held this office since 1768. He was first appointed during pleasure, with a salary of L. 1200; but in 1771 he obtained a new commission, granting it to him for life, under the same reservation, however, as to appointing deputies, which is thus expressed in his commission: "*Reservan. nobis, et hæredibus et successoribus nostris, solam potestatem nominandi et constituendi omnes clericos dependentes superdict. locum et officium clerici nostrorum registorum et rotulorum infra illam partem dicti regni nostri.*"

In 1670, Sir Archibald Primrose, then Clerk Register, appears to have granted two different commissions to Sir John Foulis; one appointing him keeper of the two registers of feifins in Edinburgh, viz. the general and the particular register; and the other appointing him the Lord Register's deputy or assistant, for marking all the particular register books of feifins, and of receiving them back into the general repository when filled up. These two offices, though distinct, became thus united in one person; and, in 1701, upon the resignation of Sir John, one commission for both offices was given to William Foulis by the Earl of Selkirk, then Clerk Register, which, for a time, seems to have created the idea of some connection between them.

Mr Foulis having died in 1737, the Crown, in virtue of the reservation in Lord Marchmont's commission, named Mr Baron Maule his successor. This commission, (which was probably copied from Mr Foulis's), after the preamble, &c. proceeds thus: "*Nominamus prefatum Joannem Maule, armigerum, duran. omnibus suæ vitæ diebus, solum et unicum clericum et custodem generalis registri fasinarum, reversionum, remunerationum, refigurationum, ad remanentiam, aliorumque scriptorum, registrarum apunctuatorum in Scotia, per decimum septimum actum vigesimi secundi Parliamenti Regis Jacobi Sexti, apud Edinburgum 28. Januarii 1617, et subsequent. acta Parliamenti, et etiam solum et unicum clericum et custodem particularis registri reversionum fasinarum, aliorumque, infra vicecomitatus de Edinburgh, principal. Haddington, Linlithgow, et Bathgate, duran. spatio prædict. et solum et unicum officiarium duran. spatii prædict. ad notandum omnia particularia registra fasinarum, aliorumque scriptorum, infra respectivas vicecomitatus, in quibus particularia registra custodiuntur; cum numero particulari foliorum quas continent, et recipere dict. libros, seu particularia registra quando implentur et redeuntur; eademque custodire pro usu subditorum nostrorum, et ex iisd. dare extracta omnium scriptorum et evidentiaram quas continebuntur, secundum priorem praxin et corresponden. legibus Scotiæ.*"

On Baron Maule's death, Mr Andrew Stuart was, by a commission from the Crown, of the same tenor, named his successor, both as keeper of the general register and of the particular register of feifins for the Edinburgh district. In virtue of this commission he has been ever since in the use of marking the books of both: But although the right of marking the books of the other particular registers, and of receiving the books of all the registers after they are

filled up, is likewise contained in his commission, the Lord Clerk Register, and the private assistants appointed by him, have uniformly continued to perform these duties*, and also to have the ultimate custody both of the general and of all the particular registers, and the right of granting extracts from them.

Lord Frederick Campbell conceiving that the commission granted to Mr Stuart was *ultra vires* of the Crown, brought an action of declarator against him, his depute and substitute, and likewise against the Officers of State, concluding to have it found and declared, *1st*, That as Lord Register, he and his successors in office, and deputies to be appointed by them, were alone entitled to keep the general register of feifins; *2dly*, That they had the sole right to mark the books both of the general register and of the particular register for the Edinburgh district, previously to their being filled up, and that Mr Stuart and his deputies should henceforth bring the books of the said particular register to be so marked before writing in them.

On the other hand, Mr Stuart brought a counter action against the Lord Register and his deputies, for ascertaining his right to exercise the whole functions vested in him by his commission, and particularly those which he had not hitherto exercised, *viz.* the right of marking by himself, or his deputies, the books of the whole particular registers of feifins, as well as those of the Edinburgh district, and of the general register, previously to their being filled up, and of receiving them back, and keeping them when filled up; and, in general, of being the sole keeper, and alone entitled to give extracts from the whole books of all the registers of feifins, both general and particular, from the time of the institution of these records down to the present day †.

The actions were conjoined; and the Lord Ordinary having taken them to report, Lord Frederick Campbell, in support of that branch of his libel which related to his right to appoint the keeper of the general register,

Pleaded: The clause introduced in the commission to the Lord Registers since 1728, reserving to the Crown the nomination of “ omnes clericos dependentes superdict. locum et officium,” cannot

* The operation of marking is performed by the Lord Register thus: Before each book is given out by the Lord Register, or his assistants, to the keepers of the different particular registers, every leaf of it is numbered, and every 10th superscribed by one of these assistants. All the other leaves are likewise marked by the same assistant with the initial letters of his name. A doquet is also written on the first page, mentioning the number of leaves in the book, and giving general directions about the manner of ingrossing the writings. Another short doquet is written on the last page, specifying the number of leaves in the book, and each of these doquets is subscribed by the Lord Register's private man of business, (who has a commission for that purpose), in order probably to check the number of books marked and given out by his assistants.

† These actions were brought chiefly in order to determine the question of right, it having been mutually understood by the parties, that, in whatever way they should be decided, no change was to take place, in regard to the persons who at present exercise and reap the benefit of the offices in dispute.

not have the effect of vesting the patronage of this office in his Majesty. The statute 1617, not only declares the registers of feifins "to belong" to the Clerk Register, and incorporates them with his office *, but also expressly empowers him to name deputies for taking care of them, and makes him responsible for their conduct, which he could only be, on the supposition that they were of his appointment. Although, therefore, it might be lawful for the Crown to reserve to itself the appointment of the Clerks of Session, and the other patronage which belonged to the Lord Register, independently of statute, no power short of the Legislature could deprive him of the right of naming the keeper of the general register; Bacon's Abridg. *voce* Prerogative.

Accordingly Baron Maule, Mr Stuart's predecessor, was so much satisfied that his commission from the Crown in 1737 was ineffectual, that on 25th May 1739, he obtained a ratification of it from the Marquis of Lothian, then Clerk Register; and afterwards, on 4th March 1742, he altogether abandoned the royal commission, and accepted of a new one from his Lordship in the same terms. This transaction, too, besides shewing how little faith the Baron had in the right of the Crown, effectually precludes Mr Stuart from founding on the possession of the Crown, beyond the date of his own commission in 1781. But even although the defenders could plead possession from 1737, the date of Baron Maule's commission, it would not avail them, as a statute meant to regulate the constitution and public police of the country, and not introduced from any temporary circumstances in the situation or manners of the people, cannot go into desuetude.

Answered: The prerogative of the Crown, in the distribution of public offices, can only be limited by consuetudinary law, or an express enactment of the Legislature; such limitation will never be presumed.

So far was it from having been the object of the Legislature, by the act 1617, to deprive the King of any part of his prerogative, with respect to the office of Clerk Register, that an unprinted act, passed that very year, (17th June 1617), which, while it limited the King's power as to the number of officers of State, (of whom the Lord Register is one), who should have a seat in Parliament, in right of their offices, plainly acknowledges his right to split them in what manner he pleased, by "*deputation, division, or otherwise.*" And accordingly his Majesty frequently exercised these rights, in the course of the last century, with respect to this very office.

Moreover, the Crown has been in uninterrupted possession of the appointment in question since 1737, the date of Baron Maule's commission.

* Lord Fredrick Campbell, in his libel, only claimed the right of naming the keeper of the general register; but he admitted, that his argument went the length of disputing the Crown's title to appoint the keepers of the particular registers.

commission. What is said of his first accepting a ratification, and afterwards a new commission from the Lord Register, is of little moment : For, 1st, As it is not pretended, that these writings were found in the Baron's repositories, there is no evidence that they were either asked or accepted by him. 2^{dly}, Although the commission from the Lord Register concludes, like that from the Crown, recommending him to the Lords of Council and Session to administer to him the oaths required by law, and "admit him to the exercise of the foresaid offices," it is confessed, that it never was produced to the Court ; nor did it ever become a part of the title on which the Baron held the offices. 3^{dly}, In 1761, the Baron having applied for and obtained a salary from the Crown, of L. 200 yearly, the warrant, by which it is granted, narrates his commission from the King in 1737, and no other ; and it appears from the grant, that the salary was bestowed on him as an officer directly appointed by the Crown.

Besides, although Lord Frederick Campbell only insists at present for annulling the defender's commission as keeper of the *general* register of feifins, his argument, if there were any ground for it, applies with equal force to voiding it, in so far as it appoints him keeper of the particular register for the Edinburgh district. For what the Lord Register calls the incorporating clauses, are at least as strongly applicable to the particular registers, as to the general one. The defenders, therefore, so far as the question can be affected by possession, are entitled to found on the continued series of appointments by the Crown, of the keepers of all the particular registers of feifins in Scotland.

On this branch of the cause, it was

Observed on the Bench : Neither the words, nor the spirit of the act 1617, support the construction put upon it by the Lord Register. Its object was to regulate and improve the records of the country, and by no means to do, with respect to this department, what has never been done with regard to any other, to take from the Crown all power of interference in the nomination of the subordinate officers who were to manage its different branches.

The Lords unanimously, (22d May 1793), "sustained the defences pleaded for Mr Andrew Stuart, his deputies, and the Officers of State, as to the first conclusion of the Lord Register's libel, which relates to the keeping of the general register, and assoilzied him therefrom."

The Court remitted to the Lord Ordinary to hear parties further on the Lord Register's claim, to mark the books of the general register, and of the particular register for the Edinburgh district ; and on Mr Stuart's claims, to mark the books of the general, and all the particular registers, and also to the ultimate custody of these books.

His Lordship afterwards pronounced an interlocutor, assailing both parties from the respective actions brought against them.

Against this judgment both gave in reclaiming petitions, which were appointed to be answered.

In support of his own claim, and in defence against Mr Stuart's, the Lord Register

Pleaded: The act 1617 ordains "the registers to be filled up by the *said deposes*; to be marked by the Clerk of Register, and his *deputies* to be appointed by him to that effect." Here two sets of deposes are visibly distinguished. The words "*said deposes* obviously refer to the deposes specified in a former part of the statute, and who were appointed for the purpose of *keeping* the different registers. On the other hand, the deposes last mentioned are, on plain grammatical construction, a set different from the former, and here spoken of for the first time. They are appointed for the special purpose of marking the books; and not only is their nomination expressly given to the Lord Register, but they are declared to be *his deposes*, or, in other words, the instruments or hands by which he was, in all time thereafter, to perform a material branch of his duty. Accordingly, although the commissions to the Lord Register since 1728, have contained a reservation to the Crown of naming the keepers of the registers, not a word is said in them which can be construed to take away his right of marking the books, which must therefore be held to remain on its former footing. Were Mr Stuart, indeed, even so far to prevail, as to be found entitled to continue to mark the general register of feifins, and the particular one for the Edinburgh district, it would be destructive of the very purpose for which the practice of marking was instituted, viz. the prevention of interpolations; for the same person would, in that case, both mark and fill up the same books.

The only foundation for Mr Stuart's claim either as to marking the books, or to the ultimate custody of them, arises from the terms of his commission, which no doubt contains these powers; but this happened merely *per incuriam*. In 1701, the Earl of Selkirk, when Lord Register, granted to Mr William Foulis, in one commission, the different offices of keeper of the general register, of the particular register for the Edinburgh district, and of marking the books of all the particular registers, and receiving back the books of all the registers. While Mr Foulis held these offices, the Earl of Marchmont, in 1728, entered into a transaction with Government, whereby he consented, that the right of naming the keepers of the different registers should be reserved to the Crown; so that, when Mr Foulis died in 1737, the Crown had the right of filling up his office of keeper of the two registers, which it bestowed on Baron Maule; and the officer who wrote out his commission, having copied it from that of Mr Foulis, he naturally fell into the mistake of inserting in it not only his appointment to this office, but likewise the clause whereby he had been appointed, as private as-

sistant to Lord Selkirk, to mark the books, and receive the ultimate custody of them. This clause has also been continued in Mr Stuart's commission; but what shews, if possible, still more clearly, that its insertion proceeded entirely from mistake, is, that neither Baron Maule, nor Mr Stuart, ever attempted to exercise any of the powers contained in it, excepting that of marking the books of the general register, and of the particular one for the Edinburgh district, of which they themselves were keepers. On the contrary, they have been in the uniform practice of transmitting, at the end of every ten years, to the Lord Register and his private deputes, the books of both the general register, and of the particular register for the Edinburgh district, to be placed by them in the general repository, in which the books of all the different registers are ultimately lodged.

Answered: Although it were granted that the clause founded on by the Lord Register imported, that the deputy, who is to mark the books, must be different from him who is to fill up the register, there is nothing either in that clause, or in any part of the statute, which indicates that the Crown should less have the right of reserving to itself the nomination of the one officer than of the other. On the contrary, every expression in the statute, on which the Lord Register formerly founded, as incorporating with his office the right of naming all the subordinate officers employed in this department, occur in the clauses which relate to the deputes who are to fill up the registers.

At all events, therefore, it is clear, that Mr Stuart might name a particular deputy, in terms of his commission, for marking the books, providing he were a different person from him who fills them up. In truth, however, when the statute speaks of the books being marked by deputies "appointed to that effect," it only means, that the person who performs that operation must have a commission authorising him so to do, and not that he shall be incapable of, at the same time, keeping the register. Accordingly, since an early period of the last century, in so far at least as concerns the general register, and the particular register for the Edinburgh district, the offices in question have been always held by the same individual; which also shews, that their union is not inconsistent with the ends for which the practice of marking was introduced.

Further, as it is not denied that the functions, both of marking the books, and receiving them back when filled up, have, like many others, been long ago separated from the person of the Lord Register, by deputation, so it seems to be equally clear, that the Crown, not only by withdrawing the clause which, in his commission, gave him the power of appointing deputies, but by inserting an express reservation of that right, intended that these offices should thereafter be in its own gift. Accordingly, for a period of nearly sixty years, it has exclusively and expressly exercised the right of nomination, by granting them first to Baron Maule, and afterwards to Mr Stuart, both of whom have been in possession of the right of marking to a certain extent.

The

N° CLXVI.

March 7. 1795.

MARGARET RITCHIE,

AGAINST

ALEXANDER BOWES.

PASSIVE TITLE.—*The facts proved in this case found to infer the passive title of vitious intromission.*

IN 1788, Margaret Ritchie obtained a decree against Thomas Bowes, excise-officer, for payment of L. 4 Sterling yearly, as the aliment of a bastard which she had to him in 1787, until the child should be twelve years of age.

Thomas Bowes having died, she brought an action against his brother Alexander Bowes, supervisor of excise, concluding for L. 10 Sterling, as arrears of aliment due to her on the 7th March 1793, and for payment of it in future.

Alexander Bowes stated in defence, that he did not represent his brother; and the pursuer was allowed a proof of his having incurred a passive title, by vitiously intromitting with his effects.

Thomas Bowes (it appeared from the proof), about six years before his death, was stationed at Torbolton, where he furnished a small house, for which he paid L. 2 : 17 : 5 yearly. From Torbolton he went to Glasgow, where he hired a furnished room; and having consequently no use for furniture, he sent to his father's house in Kilmarnock the following articles, viz. seven chairs, a tent-bed, and a table, the value of the whole amounting to L. 5 : 15 : 6. From Glasgow he was sent to Paisley, where also he had a furnished room. He died there in February 1791; at his death, his property consisted of some clothes, a chest, a silver watch, a gun, a pair of pistols, and a fiddle, together with arrears of salary, amounting to L. 5, 13 s. which the defender afterwards received, upon his receipt, from the collector of the district. A sister of the deceased, who attended him in his illness, brought his corps to Kilmarnock in a coach, at the desire (as there was reason to believe) of the defender, and also, at her own hand, carried along with her some of the effects above enumerated. A few days after the funeral she returned to Paisley along with the defender, when

they packed up the remainder of them. What became of them afterwards the witnesses did not know. The defender, before he left Paisley, paid the medical people who attended his brother, what he owed for his lodgings, and some other small debts, which in all, including the hire of the coach, and other funeral expences, amounted to L. 18 : 18 : 4. At Whitsunday 1793, the father left Kilmarnock, and came to reside in family with the defender at Dunfermline, and brought along with him the furniture which had belonged to his deceased son.

Such being the amount of the evidence, the defender contended, that he had not incurred a passive title: That it was the constant custom of the Excise to pay the arrears of salary due to their deceased officers to their nearest relation, without requiring any title in him, merely upon his shewing evidence that he had paid the funeral charges: That it was his sister, not he, who got possession of, and carried to her father's house, the trifling effects which belonged to his brother at his death; and that although he was present when part of them were packed up, yet having immediately after set out for Edinburgh, he never inquired more after them, but took it for granted that his sister carried them to her father's house, as she had done the former parcel: That with his brother's furniture he never had any concern: It had been sent by him to his father *custodiæ causa*, who could therefore be liable for it only *in valorem*. And, lastly, that although he had taken possession of all his brother's effects, he would not have incurred a passive title, as he had never heard of the present claim against his brother till called in this action: That in the whole of his conduct, there was not the smallest appearance of fraud: That the effects themselves were of little value; and that he had already paid debts of his brother, which would have more than exhausted their price, if they had been exposed to sale.

The general arguments used on both sides, respecting the nature of vitious intromission, were in substance the same with those stated in the case of Wilson against Smith and Armour, Fac. Col. 19th June 1772, where also the whole authorities referred to will be found.

The Lord Ordinary affoizied the defender.

On advising a reclaiming petition and answers, several of the Judges were for adhering to the interlocutor, partly because they thought there was no evidence of the defender having intromitted with any part of his brother's effects, except his arrears of salary, in doing which he was justified by the practice of the Excise, and partly because it was clear that he had already *bona fide* paid debts to a larger amount than the whole value of the property left by his brother.

A majority of the Court, however, were for altering the interlocutor. If the passive title of vitious intromission still exist in our law, (it was observed), the defender has incurred it. The practice of the Excise, to pay, without a title, cannot affect the general rules of law. Independently of this, however, all his brother's effects have

ultimately landed in the defender's house, as his father and sister now reside with him; and they acted under his eye, and with his permission, in taking away what they received. It appears, also, that he had interfered with a part at least of these effects, before they were carried away, yet he did not so much as cause an inventory of them to be made. His brother must also, at his death, have had some ready money, though probably not much; of this, however, no account has been given. The defender, besides, took the whole charge of settling his affairs. / He also ordered a coach burial, which was improper, unless he meant to give out of his own pocket what money should be necessary to pay his brother's debts, in so far as his own funds were insufficient for that purpose. In short, he had a general intromission and management, without the ceremony of a title, and therefore must be presumed to have had an *animus* of representing.

The Court, (28th January 1795), "found the defender, as intromitter with the effects of his deceased brother, liable in the debt due to the pursuer, with the expence of process."

And on advising a reclaiming petition, with answers, the Lords "adhered."

Lord Ordinary, *Dunfinnan*. A&S. *Honyman*. Alt. *Fletcher*. Clerk, *Gordon*.

R. D.

N° CLXVII.

March 10. 1795.

ADAM LIVINGSTON and Others,

AGAINST

GEORGE FARQUHAR KINLOCH.

ARRESTMENT.—*When the rent of the current year is payable at Whitsunday and Martinmas, an arrestment before Whitsunday will only attach the rent payable at that term.*

THE rents of the estate of Craigforth (the tenants of which in general, enter into possession at Martinmas, and pay their rents at Whitsunday and Martinmas, by equal portions) having been arrested by different creditors of the landlord, the tenants raised

raised a process of multiple-poinning, in which the rents payable at Martinmas 1792 were claimed by Colonel Livingston, and others, upon an arrestment executed on the 12th of November 1791; and by Mr Farquhar Kinloch, upon an arrestment executed on the 18th June 1792.

The Lord Ordinary, "in respect it is admitted that the rents of the estate of Craigforth are payable at two terms in the year, Whitfunday and Martinmas, in equal portions, found, that the arrestments laid on in the hands of the tenants on the 12th November 1791 attached only the current rent that became payable at Whitfunday 1792, and that the arrestments on the 18th June 1792 attached the rents that became payable at the term of Martinmas following."

In a petition for Colonel Livingston against this interlocutor, it was stated, That not only arrears due by a tenant, but current rents, may be attached by arrestment. That by current rents, are meant those *quorum dies cessit, sed nondum venit*; Dirl. v. Arrestment. Ersk. b. 3. t. 6. § 9; and that although rents may be made exigible by termly payments, the obligation to pay a year's rent is an *unum quid*, which cannot be divided, and is wholly incurred by possession for the smallest part of the year, and that, consequently, the rents claimed were *current* on the 12th November 1791; on which account, accordingly, the landlord might then have sequestrated the stock of the tenant for payment of them.

The Lords, unanimously, refused the petition without answers.

Lord Ordinary, *Ankerville*. For the Petitioner, *D. Catcart*, Clerk, *Menzies*.

D. D.

N° CXLVIII.

May 13. 1795.

WILLIAM GRAHAM,

A G A I N S T

The CREDITORS of Harry Graham.

HEIR APPARENT.—TAILZIE.—Act 1695, c. 24.—*A person having for many years possessed in apparency, and having died without making up titles to an estate which was strictly entailed, but the entail of which was recorded only a few years before his death, upon an application from the substitutes of entail, his creditors, who had done no diligence against him, were found not entitled to attach the estate, although their debts were contracted before the entail was recorded.*

HARRY GRAHAM *senior*, in 1737, executed a strict entail of the estate of Hourston. In 1738, he was succeeded by his son Charles Graham, who took infestment on the entail.

In 1744, Charles was succeeded by his son Harry Graham *junior*, who possessed the estate in apparency till his death in 1776.

The entail was recorded in the register of tailzies in 1773, upon an application from the substitutes.

Harry Graham *junior* contracted debts to a large amount, chiefly before the entail was recorded, but partly after that period. None of his creditors did any diligence against him.

Upon his death, Alexander Graham, the next heir of entail, but not heir of line to Harry Graham *junior*, entered into possession of the estate, and connected himself by regular feudal titles with Charles Graham, the person last infest.

The creditors of Harry Graham *junior*, and also certain creditors of Charles Graham, his father, then led adjudications against the estate; and upon Alexander's being succeeded by his
only.

only for William Graham, they raised a process of ranking and sale, in which the different substitutes were called as defenders.

The estate was sold by authority of the Court of Session, and the ranking of the creditors reserved for future discussion.

In the ranking, William Graham, the heir of entail, contended, that none of Harry Graham's creditors, not even those whose debts had been contracted before the entail was recorded, had right to be ranked on the price; and

Pleaded: By the common law of Scotland, the creditors of a person possessing a landed estate in apparency, however long that possession may have been continued, cannot attach it for payment of their debts; and the next heir is entitled to make up titles to the estate, without being obliged to discharge them, Stair, b. 2. t. 3. § 16. The act 1695, c. 24. was intended, in some degree, to remove this hardship. It declares, that every person who, since 1st January 1661, whether by adjudication on his own bond, or by service, has made up titles to an estate, or shall do so in future, by connecting himself with the person last infeft, and passing by his immediate predecessor, dying in apparency, shall, provided the latter had been three years in possession, be liable for his debts and deeds, "in so far as may extend to the value of the said lands and estate, and no farther, deducing the debt already paid; and also, with this order as to the time past, that all the true and lawful debts of the apparent heir entering, as said is, and already contracted, with the true and real debts of the predecessor to whom he enters, shall be preferred in the first place."

This statute, which being correctory of the common law, is to be strictly interpreted, did not make the debts of the interjected person real incumbrances on the estate; nor could it have done so consistently with feudal principles, and the security of the records. It merely created a personal claim against the next heir, in case he connect himself with the person last infeft, to the extent of the benefit which he draws from the estate. Bankt. b. 3. t. 5. § 107; Ersk. b. 3. t. 8. § 94.

The heir making up titles in the manner pointed out by the statute, becomes liable for his predecessor's debts, in the same manner as if they had been at that moment contracted by himself. The statute, however, certainly did not mean, that they should be in a better situation than his own debts. The claim under the statute can only apply, therefore, when the heir, by his entry, acquires a right of affecting the estate by his own debts and deeds; and this holds only where he possesses in fee-simple, but not where, as in the present case, he succeeds as heir under a strict entail, and becomes little better than a mere liferenter. Indeed, from the last clause of the statute giving a preference to the debts of the predecessor last infeft, and to those of the heir who enters, over the debts of the interjected person, it is clear, that the statute was not meant at all to apply to entailed suc-

cession; for as these two classes of preferable debts do not affect an entailed estate, still less surely can the postponed ones.

At any rate, the right of the creditors could only extend to a personal claim against the heir who made up titles, to the extent of the rents intromitted with by him.

Answered: The registration of an entail is essentially requisite in order to make it effectual against creditors and purchasers. Till that step is taken, the possessor of the estate, in so far as they are concerned, is to be considered as holding it in fee-simple. The rights which they have acquired cannot be affected by the entail being afterwards recorded, whether at the desire of their own debtor or of the substitutes; and their debts are to be considered as the debts of the tailzier, which are transmitted as a burden on the successive heirs of entail.

It was the object of the act 1695, to put creditors contracting with an heir apparent three years in possession, in case the next in succession should make up titles, passing him by, in the same situation as if their debtor had completed his titles; a fact which they very naturally take for granted, from their seeing him so long exercise the rights of proprietor.

No argument can be drawn from the clause in the statute, giving a preference to the creditors of the person last infest, and of the heir entering, over those of the person dying in apparenacy. So strongly was the Legislature impressed with the favourable situation of the creditors of the latter, that in questions with the heir entering, it gave the statute a retrospect of 30 years, but it was thought unreasonable that this retrospect should affect the interests of those creditors who alone had formerly any claim against the heir in possession; but this clause, it is evident, applies only to debts contracted between 1661 and 1695.

The Lord Ordinary reported the cause.

Observed on the Bench: The question is not, Whether the debts, when contracted, were struck at by the entail; but, whether they can now be made effectual against the tailzied estate, although no step was ever taken to connect the person who contracted them with it, and although the next heir cannot affect it with his own debts, the tailzie having been rendered complete, by registration, before he succeeded? The act 1695 introduces merely a passive title against the heir in possession, and therefore it can only reach subjects which he himself can burden.

The Lords sustained the objection.

A reclaiming petition was (2d June 1795) refused, without answers.

Lord Reporter, *Dregborn.* For the Objector, *Honyman.* Alt. *Da. Williamson,*
Ja. Montgomery. Clerk, *Menzies.*

D. D.

N° CLXIX.

N^o CLXIX.

May 14. 1795.

The EARL of FIFE,

A G A I N S T

Mrs MARTHA MACKENZIE and ELIZABETH FRASER.

CLAUSE.—*The clause under mentioned found not to convey nomina debitorum, nor bank-notes.*

ALEXANDER UDNEY DUFF, by postnuptial contract of marriage, disposed “to and in favour of his wife, Mrs Margaret Duff, in case she shall happen to survive him, and to her heirs, executors and assignees, the whole *moveable goods, gear and effects*, which shall belong to him at the time of his decease, including heirship-moveables, household-furniture, outfit and insight plenishing, silver-plate, jewels and linens; and in general, *all moveable goods and effects*, of whatever kind and denomination, shall happen to belong to him at the time of his death, and that free of all debts and deductions whatever.”

Mr Udney Duff predeceased his wife; and on her death, the Earl of Fife, her general disponee, brought an action against her husband's executors, in which he claimed, under this clause, his whole personal estate, amounting to above L. 15,000, consisting of bonds and bills, and L. 400 in Bank-notes, found in his repositories at his death. On the other hand, Mrs Martha Mackenzie, and Elizabeth Fraser, Mr Duff's executors, contended, that the clause reached *corpora mobilia* only, in contradistinction to *nomina debitorum*; and

Pleaded: If it had been intended to convey bonds and bills, or even money, they would have been expressly enumerated; but so far from this, the clause is expressed in a technical language, which is understood to comprehend only moveable goods properly so called, not debts nor ready money. Besides, as the clause enumerates household-furniture, silver-plate, &c. it can only carry things of the same sort with, and not of greater value than, those enumerated; Dirleton, *voce* Inhibition; Clerk Home, 18th February 1737, Cuninghame; Falconer, 19th February 1745, Ker; 1776, Fraser*; Fac. Coll. 17th November 1758, Johnston against Wilson.

The

* Not yet collected.

The executors also took notice of some particular circumstances attending the execution of the deed, from which they inferred, that it was not the granter's intention to include his money-estate; and they founded on Lord Stair's Report of the decision, 1st December 1699, Henderson, as tending to support their construction, though, upon special circumstances, an opposite judgment was given.

Answered: The word "goods" comprehends executry of all kinds, and is so applied in the statutes 1540, c. 120.; and 1690, c. 26. In like manner, "gear," both in law and in common language, means ready money, and *nomina debitorum*, and is accordingly expressly used in that sense in the act 1669, c. 19. The words "goods and gear," taken together, therefore, clearly carry the whole personal estate; Dalrymple, 1st December 1699, Henderson against Beer. It is true, that in the cases referred to by the defenders, a more limited signification was given to these words. But this arose from its being apparent from the remainder of the clause, that the granter meant to use them in a more confined sense, a reason which does not occur here; for although household-furniture, silver-plate, &c. are afterwards enumerated, yet the expression used in that part of the clause does not restrict the grant to these and similar articles. On the contrary, it conveys Mr Duff's whole moveable goods, gear, and effects, "including" these particulars; from which it is evident, that other articles of greater value, not enumerated, were meant to be conveyed; and these can only be ready money and *nomina debitorum*.

The Lord Ordinary took the cause to report.

The Court, on the grounds stated for the defender, unanimously found, "That the conveyance in the contract of marriage by "Alexander Udney Duff in favour of Mrs Udney Duff, in the "event of her surviving him, extends only to the *ipsa corpora* of "moveables, and does not include debts or sums of money."

A reclaiming petition for the Earl of Fife was refused without answers, 16th June 1795.

Lord Ordinary, *E/kgrove*.
Alt. *Tait, Monypenny*.

Agt. *Dean of Faculty Erskine, J. W. Murray*.
Clerk, *Home*.

R. D.



N^o CLXX.

It carried, however, by the Moderator's casting vote, to refuse the delay; and a petition in favour of Mr Archibald Gray, from some of the heritors and elders of the parish, having been read, they, *de plano*, appointed him to the charge, and fixed a day for his settlement.

One of the ministers present took a protest against these proceedings; and Mr Bolt having received the presentation in the evening, he waited on the Moderator, and required him, under form of instrument, to receive it, and to take the necessary steps for Mr Nicolson's settlement.

The Presbytery having, nevertheless, settled Mr Gray on the day appointed, Lord Dundas brought an action against them and Mr Gray, concluding, that it should be declared, "That he had exercised his right as patron within the time required by law; and that the presentation granted by him in favour of Mr Nicolson was valid and effectual."

In defence, it was

Pleaded: By our ancient law, a lay-patron was obliged to present within four months after the vacancy; Reg. Maj. b. 1. c. 2. § 3. Afterwards, by 1567, c. 7. where a vacancy happened by the incumbent's death, six months were allowed to the patron from his knowledge of it; and by 1592, c. 115, where the vacancy arose from his deprivation, he was allowed six months from the time the extracted sentence of deposition was shewn to him. But patronage was abolished by 1690, c. 23; and although the rights of patrons were restored by 10th Anne, c. 12, yet this was done under certain modifications. The Legislature saw that it was a great hardship on parishes, when their patron was in a distant country, that they should wait a minister for such a length of time as was necessary, to give him six months for filling the vacancy after its notification; it would also occur to them, that it might be often difficult to ascertain when that notification was actually received. Accordingly, by § 3. of that statute, it is declared, "That in case the patron of any church aforesaid shall neglect or refuse to present any qualified minister to such church, that shall happen to be vacant the said 1st day of May, or shall happen to be vacant at any time thereafter, for the space of six months, after the said 1st day of May, or after such vacancy shall happen, that the right of presentation shall accrue and belong for that time to the Presbytery of the bounds where such church is, who are to present a qualified person for that vacancy, *tanquam jure devoluto*." From which it is evident, the right of patrons is limited to six months from the death of the incumbent; and such is the opinion of Forbes, (Inst. Part I. p. 52.) who lived at the time the act was passed.

Answered: It is admitted, that by the statutes 1567, c. 7. and 1592, c. 117, patrons were allowed six months for presenting from the time they got notice of the vacancy. Now the declared object of the 10th Anne, was to put the right of patronage precisely

cisely on the same footing on which it stood before the act 1690; Macdowall, b. 2. t. 8. § 59.; Erskine's Principles, b. 1. t. 5. § 9.; Institute, b. 1. t. 5. § 17.; Fac. Coll. 2d March 1762, Pror. for the Church against Earl of Dundonald; 10th August 1770, Erskine against Presbytery of Paisley*. It is entitled, "an act to *restore* patrons to their *ancient* rights;" and even the clause founded on by the defenders, although somewhat inaccurately expressed, will not bear the construction they put on it. It only deprives the patron of his right, if he "*neglect* or *refuse*," to present within the six months; an expression which evidently implies, that he must be made acquainted with the vacancy before they begin to run.

Besides, were the construction put on the clause by the defenders adopted, patrons might in some cases be deprived of their right before they could hear of the vacancy; and in many, they would have much too little time for making proper inquiries respecting the qualification of candidates; hardships to which it is not to be presumed that the Legislature meant to subject them.

Supposing, however, the construction contended for by the defenders were well founded, Lord Dundas has complied with it. As he subscribed the presentation within the six months, he cannot be said to have either neglected or refused to exercise his right for that period. It is true the statute 1567 required, that the patron should, within the six months, transmit the presentation "to the superintendent of the partis quhair the benefice lyes." But this requisite is wholly omitted in the 10th Anne; and if it is true, as the defenders argue, that an alteration has been made on the ancient rights of patrons by that statute, Lord Dundas is entitled to say, that under it he has, by signing the presentation *within* the six months, done all that is required for preserving his right.

The Lord Ordinary reported the cause.

When it came to be advised, two of the Judges thought, that the words of the 10th Anne clearly imported, that patrons were to present within six months from the vacancy. They also thought, that it was requisite that the patron should lodge the presentation within that period, and that therefore the action fell to be dismissed. One of the two even doubted, whether the Presbytery could wave or renounce their *jus devolutum*.

The rest of the Judges (one excepted) also concurred in thinking, that the 10th Anne had altered the former law, and that the six months now commenced from the death of the last incumbent. But although this alteration (it was observed) is in the main beneficial, as it prevents all disputes about the period when the notification is received, the statute is not to be judaically interpreted. Lord Dundas executed the presentation a full month before the time limited; and it was owing to unforeseen accidents, in no way imputable to him, that it did not reach Zetland before it expired.

The

* Not yet collected.

The Lords “repelled the defences, and found and declared in terms of the libel.”

Lord Ordinary, *Eshgrove.* A&C. Dean of Faculty *Erskine, Ch. Hay.* Alt. *George Fergusson.* Clerk. *Menzies.* R. D.

N° CLXXI.

June 2. 1795.

ARCHIBALD CAMPBELL,

AGAINST

COLIN CAMPBELL.

TACK.—*A tenant found not entitled to cut sea-ware for the manufacture of kelp, although the lease gave him the lands, with “parts, pendicles, and universal pertinents thereof, used and wont;” and although a proof was offered, that he and the former tenant had been accustomed to do so.*

COLIN CAMPBELL possessed on a lease, which commenced in 1759, one half of the farm of Nether Kames, on the coast of Argyleshire, with the “houses, biggings, yards, orchards, “mosses, muirs, meadows, grassings, sheelings, parts, pendicles, “and universal pertinents thereof, used and wont.”

Archibald Campbell purchased this farm in 1786; he soon after complained to the Sheriff, that his tenant pretended to a right to cut sea-ware for the manufacture of kelp, and therefore he craved an interdict against his doing so in future.

The Sheriff granted the interdict, in respect, that “making the kelp, and cutting the shores, do not fall to be considered as “part and pertinent of a farm.”

Two bills of advocacy having been refused, the tenant presented a reclaiming petition, which was (2d December 1794) refused without answers.

In a second petition, which was appointed to be answered, the tenant offered to prove, that he and his father had been accustomed to manufacture kelp ever since the commencement of the lease; and that such likewise, though not to the same extent, had been the practice of their predecessor in the farm.

In the answers, the landlord denied the extent of the practice, which, he alleged, had been often interrupted.

The tenant, in point of law,

Pleaded: Wherever a farm, situated on the sea-shore, (which, in so far as it is not necessary for purposes of public utility, is
juris

juris privati; Stair, b. 2. t. 1. § 5.; Ersk. b. 2. t. 6. § 17), is let to a tenant merely by the name by which it is generally known in the country, without mentioning the number of acres it contains, or specifying its boundaries, it will be held to include the landlord's right in the shores. If the sea should recede, the tenant will be entitled to cultivate and bank the ground which is left by it; and for the same reason, he is entitled to those vegetable substances which are produced on the surface of the shore.

The tenant, in the present case, has not been opposed in cutting the sea-ware for the purpose of manuring his farm and feeding his cattle. Since, therefore, it is included in the lease for one purpose, it must be so for every other to which it can be put, *salva rei substantia*; and this holds with regard to the manufacture of kelp, as the sea-ware may be cut for that purpose every third year, and even grows the more luxuriantly for being so.

Independently of the general question, as the farm is let with the "parts, pendicles, and universal pertinents, used and wont," it must be relevant to prove, from the practice of its possessors, that the cutting of sea-ware, for the manufacture of kelp, is included under that description:

Answered: The right of a tenant extends only to the annual fruits of the surface; Ersk. b. 2. t. 6. § 22. On that account he has no right to mines or minerals, (Stair, 16th February 1668, Colquhoun), even for the purpose of manuring his farm, 10th February 1778, Bethune against Jarvis; nor to the woods which grow upon it; and for the very same reason, he has no right to sea-ware, which must be of several years growth before it is fit to be manufactured into kelp; 14th November 1781, Lord Reay against Falconer. And although it has not hitherto been thought worth while to object to the tenant's cutting sea-ware for other purposes, his doing so is by no means admitted as a matter of right.

Even if the lease had given an express right to sea-ware, it would only have extended to a right of cutting it for the proper uses of the farm, in the same manner as it has been found in the case of an express right to cut timber; Gilm. 16th June 1664, Touch against Ferguson.

A subject which is thus of a different nature from those usually included in a lease of land, and different also from those which are expressly conveyed, cannot be understood to come under the description of a pertinent; and the proof offered, especially in a question with the pursuer, who is a singular successor, is irrelevant; Ersk. b. 2. t. 6. § 24.

Upon advising the petition, with answers, the Court had no doubt, that, in the general case, a right of manufacturing kelp could not be enjoyed as part and pertinent of a farm; but several

of the Judges thought, that the proof offered should be allowed before answer.

The Lords "adhered."

Lord Ordinary, *Ankerville.* A&. *M. Rossi.* Alt. *Hope.* Clk. *Sinclair.*

D. D.

N° CLXXII.

June 3. 1795.

(TEIND COURT.)

ANDREW SKENE and JOHN ELMSLIE,

AGAINST

The OFFICERS of STATE, and Others.

TEINDS.—*Teinds vested in the Crown, in right of the Bishops, cannot be allocated in payment of stipend, till those heritably possessed by the proprietors of the lands are exhausted.*

THE minister of the parish of Daviot having obtained an augmentation of his stipend, the Officers of the Crown gave in a scheme of locality, in which the teinds of certain lands were localled upon, *ultimo loco*, in respect they formerly belonged to the bishop of Aberdeen, and were now in the hands of the Crown in his right.

To this scheme Messrs Skene and Elmslie, heritors in the parish, who had heritable rights to their teinds,

Objected: Although in consequence of the act 1693, c. 23. teinds formerly belonging to bishops, cannot be purchased while they remain with the Crown; yet neither that nor any other statute, has conferred upon them any privilege in point of allocation.

It is well known, that the chief cause for passing the act in question, was, that, at its date, the Legislature had not wholly given up the idea of establishing Episcopacy in Scotland; but now, when the reason of the enactment no longer exists, there can be
no

N° CLXXIII.

June 5. 1795.

The HEIRS of Robert Selby, &c.

AGAINST

JAMES JOLLIE.

RECOMPENSE.—*A person holding an heritable subject in trust, and having a right of retention over it for debts owing to him by the proprietor, is not liable for the claims of tradesmen, for meliorations made upon it by desire of the latter.*

THIS is a sequel of the case, reported 26th November 1793, Creditors of Brough against Jollie.

Mr Jollie purchased an area for John Brough, in consequence of a commission from him; and with his consent took the rights to it in his own name. Brough having afterwards become bankrupt, it was found that Mr Jollie was entitled to retain the subject, in competition with Brough's other creditors, till he should be relieved of certain cautionary obligations which he had undertaken for him.

As Brough, however, before his bankruptcy, and while the area stood in Mr Jollie's name, had employed various tradesmen in erecting a building upon it, the interlocutor, sustaining Mr Jollie's right of retention, "reserved to the parties to be heard, "how far individual tradesmen, creditors of the said John Brough, "have a right to insist against Mr Jollie for payment of work "done, or materials furnished by them to the subjects in question."

The cause having been remitted to the Lord Ordinary, in order to have this point settled, Alexander Ritchie, slater, and the heirs of Robert Selby, plumber, claimed from Mr Jollie payment of accounts due them for work done on the subject; and

Pleaded, 1st, As, ex facie of the records, Mr Jollie was absolute proprietor of the subjects, the pursuers were not bound to know that he held them in trust for Brough, but were entitled to rely on him for payment.

2dly, Although Mr Jollie purchased the subjects for Brough's behoof, still, as the rights were taken in his name, the property was vested in his person; Stair, 24th January 1672, Boylston against Robertson; and Brough's right consisted merely in a personal obligation against him to denude, consequently Mr Jollie must be liable for sums expended on them.

3dly, Even granting that the property was in Brough, as the value of the subjects burdened with Mr Jollie's right of retention was encreased by the operations of the pursuers, and consequently his security rendered broader, he has been *locupletior factus* by their means, and is therefore bound to repair their loss; Stair, b. 1: tit. 8. § 6.; Erskine, b. 3. tit. 1. § 11.

Answered: 1st, Although the rights of the subjects were taken in Mr Jollie's name, the pursuers knew that he held them in trust for Brough. The latter alone superintended the erection of the building, and employed the pursuers, and other tradesmen, for that purpose. It is therefore from him they must seek payment. The defender could only be subjected on the footing of tradesmen having an hypothec upon houses, for sums laid out in building or repairing them; a thing unknown in our law, unless in the case of repairs made within burgh, by order of the Guild Court.

2dly, The decision Boylston against Robertson has been long considered to be erroneous. It has been often found both before and since, that although a factor or trustee purchase a subject in his own name, the substantial right of property is nevertheless vested in his constituent; 9th March 1669, Street against Mafon; 15th March 1707, Hay; 4th January 1744, Sir John Baird; November 1765, Alison. If Mr Jollie had become bankrupt, his creditors could not have attached the subject in question for their payment.

3dly, As Mr Jollie can in no event get more than payment of his debt, he cannot properly be said to be *locupletior* by the sums laid out by the pursuers. He is *certans de damno evitando*, equally with them, but a claim of recompense lies only against the *captator lucri ex aliena jactura*; Clerk Hume, 4th December 1735, Burns.

The Lord Ordinary reported the cause.

Some of the Judges thought Mr Jollie was liable, both because he was to be considered as proprietor, and Brough merely as his agent in erecting the building and employing the tradesmen; and because an advantage had accrued to him from the operations of the latter; for as he did not dispute that the original price of the area was a burden on his right, if no building had been erected upon it he would have had no security for his debt.

A considerable majority were, however, of an opposite opinion. It is admitted, (it was observed), that the pursuers were employed solely by Brough; it is also clear, that he was substantially and

ultimately the proprietor of the subjects ; the personal obligation, which arises against the *locator operarum* attached on him alone. Now, as the pursuers are not *creditores hypotecarii*, Mr Jollie could only be subjected on the principle, *nemo debet locupletari aliena jactura*. But to apply this rule here, would be extending its operation too far, for in this way persons would be brought under it, whose *lucrum*, (if it can be so called), reached only to a recovery of a just debt, and a claim of recompense lie against every heritable creditor, whose security was rendered broader by meliorations made at the desire of the proprietor.

The Lords assailed the defender.

Lord Ordinary, *Dreghorn*. A& *Baird*. Alt. Dean of Faculty *Erskine, Cullen*.
Clerk, *Menzies*.

R. D.

N° CLXXIV.

June 10. 1795.

JOHN HENDERSON, acting Trustee and Executor of William Crichton, and others,

AGAINST

CHARLES SELKRIG, Trustee for the Creditors of Alexander Crichton.

TESTAMENT.—FOREIGN.—*Heritable property cannot be conveyed by a testament executed in England, although it would there have been effectual for that purpose.*

PATRICK CRICHTON executed a settlement of the lands of Newington, in favour of his sons, William and Alexander, ' equally betwixt them, and the heirs whatsoever of their bodies ; and failing any one of them by decease, to the survivor of his said two sons, and to the survivor's heirs and assignees whatsoever.'

The

The sons made up titles under this settlement; and the destination being simple, each was unlimited heir of his own half.

William settled in London, and died in 1782, without lawful issue.

He left a will, in the following terms :

“ The last will and testament of me William Crichton of Brabant Court, Philpot-lane, London, merchant. I will and desire that all my estate and effects, as well real as personal, (not placed out at the time of my death on such securities as my executors shall approve of), be sold and disposed of, collected and got in, and turned into money ; and for that purpose, I give all my real estates in Scotland to my brother Alexander Crichton of Edinburgh, and his heirs, in trust, to be sold together or in parcels, for the best price or prices he or they can reasonably get for the same ; and I give all other the real estates of which I am seized in fee, by way of mortgage, to Mrs Priscilla War- ricker of Baddow, in the county of Essex, widow ; and John Henderfon of Mitre Court, Milk Street, London, merchant, and their heirs in trust,” &c

This deed, it was admitted, was a valid conveyance of landed property in England ; but Alexander, conceiving that it could not have that effect in this country, refused to accept the trust, and made up titles to William’s half of the lands of Newington as heir of provision under his father’s settlement.

Alexander Crichton having become bankrupt, he, *inter alia*, disposed the lands of Newington to Charles Selkrig, for behoof of his creditors.

John Henderfon, acting trustee and executor under William Crichton’s will, and his residuary legatees, brought an action against Mr Selkrig, concluding, that he should be ordained to denude of William Crichton’s half of the lands in their favour ; and,

Pleaded : 1st, The settlement in question, it is admitted, would be sufficient for the conveyance of heritage in England. And it would be unjust, that a person, by residing abroad, where there is not a *copia peritorum*, should, on that account, lose the power of disposing of his property. Accordingly, with respect to every personal subject, foreign deeds are equally effectual as if they were executed agreeably to our own forms ; and effect is also given to deeds, binding the granter to convey heritage in this country, if framed agreeably to the laws of the country where they are executed. Now William Crichton’s settlement, although an actual conveyance, cannot be less effectual than an obligation to convey, which, both in law and good sense, it must be held to imply ; Stair, b. 3. t. 4. § 2.

2dly,

2dly, The settlement, in the clause conveying the lands, makes use of the word "give," which of itself must render the grant effectual, as it is understood, that heritage may be conveyed by testamentary deed, provided the granter use the dispositive words "give, grant, or dispoſe," in place of, "legate or bequeath;" Erskine, p. 552; Stair, 31st December 1667, Henderson; 21st November 1759, Mitchel.

Answered: 1st, Personal contracts, or even obligations, to convey heritage in Scotland, which are executed abroad; and according to the forms there established, may be effectual; but the deed in question, which was altogether dependent on the will of the granter, laid him under no obligation; and his heirs can as little be bound by it, unless it be good as an actual settlement of heritage, to the validity of which it is essential, that it be completed according to the rules of our own law; Erskine, b. 3. t. 2. § 40.

2dly, It may be true that a testament, and a conveyance of heritage, may at present be written on the same piece of paper. But the latter always requires *verba de presenti*, importing an immediate alienation of the property; Dict. vol. ii. p. 459; 4th December 1735, Brand, although such alienation may indeed be so qualified, by clauses declaring the deed revocable, dispensing with the delivery, &c. as in effect to leave it no further operation than a testamentary deed. But the will in question is a mere declaration of what the testator desired to be done, not *at its date*, but *after his death*. The clause in which the word "give" occurs, is not a separate and independent conveyance of his Scotch heritage. The settlement begins with testamentary words, declaring the testator's will respecting his whole estate, real and personal; and "for that purpose," that is, to render his will more easily effectual as to his heritage in Scotland, he "gives" it in trust to Alexander Crichton. This clause, therefore, so far from being distinct from the testamentary part of the deed, is inserted for the sole purpose of facilitating its execution.

The Lords assailed the defender.

A reclaiming petition was refused (7th July 1795) on the general point; but it having been there urged, that since Alexander Crichton refused to implement his brother's will, he was bound to restore a legacy which had been left him by it, the Court remitted that branch of the cause to the Lord Ordinary.

Lord Ordinary, *Dreghorn*. Aft. *Maconochie*. Alt. *Jo. Clerk*. Clerk, *Menzies*.

R. D.

N°CLXXV.

N^o CLXXV.

June 13. 1795.

The Earl of DUMFRIES,

AGAINST

DOUGAL JOHN CAMPBELL.

PROCESS.—*A declarator of non-entry, raised against the heir of the vassal last infeft, may, upon the death of the defender, before decree, be transferred against the succeeding heir.*

THE Earl of Dumfries, as superior of the lands of Skerrington, and others, brought an action of declarator of non-entry against Eleonora Campbell, who possessed these lands in apparen-
cy, under a strict entail executed by her father John Campbell, the vassal last infeft.

The summons stated, “ That these lands are in the pursuer’s hands, by reason of non-entry, since the death of the said John Campbell, and will continue so until the entry of the said Eleonora Campbell.” And it concluded, that this should be declared by the Court: That she should be ordained to enter and pay to the pursuer the non-entry duties in time past, and a year’s real rent for her entry; and that it should be declared, that the pursuer has right to levy the rents of the present year, and in time coming, until the entry of the vassal.

Before decree was obtained, the process was allowed to sleep.

Eleonora Campbell having died, the Earl of Dumfries brought an action of wakening and transference, against her son Dougal John Campbell, the next heir of entail in the lands, “ as heir served and retoured to his said mother, and others his predecessors in the said lands, or as otherwise representing them in one or other of the passive titles known in law, to the effect, that the pursuer may have such action and execution against him, as he would have had against the said deceased Eleonora Campbell during her lifetime, or as he might have had were she still in life.”

The Lord Ordinary wakened and transferred “ *in statu quo.*”

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In

In a reclaiming petition, it was

Pleaded: The defender in no respect represents his mother. He makes up his titles to the lands in question, as heir of entail to his grandfather: But the object of an action of transference is to make the defender personally liable for the conclusions of the original summons; it is therefore competent only, (as indeed appears from the uniform style of the libel), where the conclusions of the original summons are applicable against the defender, and where he represents the deceased. But the conclusions of a summons of non-entry are so strictly personal to the original defender, that they cannot be transferred against his heir. Like charges given to an heir to enter, with summonses of adjudication led upon them before decree, they fall to the ground upon the death of the person against whom they are directed.

Answered: By the old law, the superior was entitled to resume possession of the lands upon the death of the vassal; and that, not as a penalty against the heir, but in virtue of his radical right in the lands. This idea is still kept up in the style of a summons of non-entry. The action proceeds rather against the lands than the heir of the vassal, who is made a party only to give him an opportunity of redeeming them.

Declaratory actions in general may proceed against the heir, without evidence of his having incurred a passive title, or giving him a charge to enter; Stair, p. 589; Ersk. b. 4. t. 1. § 46. And this is quite established as to actions of transference, in which all defences, both against the passive titles, and the conclusions of the principal action, are reserved entire; Stair, b. 4. t. 34. § 1, 2; Bankt. b. 4. t. 24. § 64; Ersk. b. 4. t. 1. § 60.

The Lords, upon advising the petition, with the answers, unanimously “adhered.”

Lord Ordinary, *Ankerville.*

A&C. *Cba. Refs.*

Alt. *Honyman.*

Clerk, *Home.*

D. D.

N^o. CLXXVI.

June 16. 1795.

R E B E C C A H O G,

A G A I N S T

T H O M A S H O G.

FOREIGN.—**HUSBAND and WIFE.**—*A marriage having been celebrated in England, then the domicil of both parties, and having been dissolved by the death of the wife in Scotland, to which their domicil had, by that time, been removed, her executors were found to have no claim on the moveable effects of the husband, she having, by articles entered into before the marriage, stipulated to herself a provision out of the fortune which her husband was to receive by her.*

ROGER HOG, a native of Scotland, in 1737, when settled in London as a merchant, married there an English lady, with whom he received a fortune of above L. 3500. By marriage-articles, previously executed in the English form, it was provided, that Mr Hog should, from his wife's fortune, lay out L. 2500, or such other sum as should be necessary for the purchase of a real estate, yielding L. 100 a-year; and that the estate so purchased should be conveyed to trustees, for behoof of Mr Hog and his wife during their lives, and of the children of the marriage after the death of the survivor; the right of the children to be subject to the disposal of Mrs Hog, both during the subsistence, and after the dissolution of the marriage.

Mr Hog accordingly purchased, and conveyed to the trustees, as directed by the articles, an estate, which Mrs Hog afterwards conveyed to Thomas Hog, her eldest son.

Mr Hog continued to reside chiefly in England till 1752, when he purchased the estate of Newliston, in Scotland, where he afterwards spent a great part of his time.

Mrs Hog died there in 1760.

After Mr Hog's death in 1789, Rebecca Hog, one of his daughters, brought an action against Thomas Hog, his general disponent, in which, *inter alia*, she, as one of the executors of her mother, claimed

claimed a share of the goods falling under the *jus relictæ* at the dissolution of the marriage.

The points at issue came to be, 1st, Where Mr Hog had his domicile at the dissolution of the marriage? 2^{do}, Supposing he was domiciled in Scotland, How far the change of domicile, which had taken place after the marriage, could have any effect on the rights of the parties, particularly as marriage-articles had been previously entered into?

The Court, (26th November 1794, and 2d June 1795), found, that Mr Hog's domicile, at the dissolution of the marriage, was in Scotland.

On the second point, the pursuer

Pleaded: With the exception of questions relating to landed property, situated in a different country, and those cases where the contrary is fixed by positive agreement, every right which a person possesses in society, is regulated by the law of his domicile; and when he changes it from one country to another, as he becomes amenable to the laws of the latter, so his rights are regulated by the rules which they establish. A person marrying in a foreign country could not import the municipal customs there acknowledged into Britain; and for the same reason, in so far as the rights of married persons differ in Scotland and in England, they must be affected by a change of domicile from the one to the other.

The claim of the wife's executors to a share of the husband's effects at the dissolution of the marriage, takes effect *vi legis*, and not from any presumed contract: The communion of goods which takes place during the marriage being little better than a name; any right depending on it may easily be disappointed by the husband *in liege poullie*; and consequently, by his changing his domicile to a country where the law does not acknowledge it. It must often have happened that parties domiciled in Scotland at the constitution of a marriage, should have been domiciled in England at its dissolution. But in no case have the wife's executors, in such circumstances, been known to claim the *jus relictæ*. Upon the very same grounds the present claim should be supported. The decision of the question of legitim between the same parties in reality determines the present*. By changing his domicile to Scotland, Mr Hog did not mean to give his children a right of legitim which he could not disappoint. They acquired it however by the act of the law. But if the right consequent on marriage had been regulated by any contract supposed to have taken place at its commencement, it must have regulated the rights of the children as well as of themselves.

Neither is the question affected by the marriage-articles. If indeed the provision there made, had been declared to be in satisfaction

* See Fac. Coll. 7th June 1791.

tion of all other claims, full effect must have been given to it. But as it is confined solely to a reservation out of her own fortune, it must be presumed that every thing else was left to contingency. The marriage-articles can have no stronger effect than if they had been framed in Scotland, where nothing, short of an express exclusion, cuts off the *jus relictæ*; Ersk. b. 3. t. 9. § 16; Bank. b. 1. t. 5. § 123.

Answered: The patrimonial rights of parties, at the constitution of a marriage, are regulated either by express contract, or by the law of the country where the husband is domiciled at the time. The latter takes effect both *vi legis*, and by an implied contract, which is as little capable of being afterwards defeated as a written one.

To hold that this implied contract can be affected by the husband's change of domicil, would be attended with very unequal consequences. His domicil, and consequently that of his wife, may be changed without her consent; and even though she, foreseeing that the law of the country to which he means to remove is unfavourable to her rights, should refuse to accompany him.

Besides, the implied contract begins to have effect immediately upon the constitution of the marriage, and complete mutual restitution is afterwards impossible. By the law of Scotland, the husband becomes proprietor of the wife's moveables: She, on the other hand, acquires right to a certain portion of the husband's effects at the dissolution of the marriage. By the law of England, the husband does not acquire the same right over the personal property of his wife, but she, on the other hand, has no *jus relictæ*. Now, it would be unreasonable that a husband, who, by having his domicil in Scotland at the constitution of the marriage, had got possession of a large personal property belonging to his wife, should, by afterwards removing to England, have it in his power to disappoint her of her *jus relictæ*, the equivalent allowed her by the law. On the other hand, it would be unfair, where the original domicil was in England, and the new one in Scotland, that the husband's estate should be subject to the *jus relictæ*, while no communion of goods had previously taken place.

The right to legitim depends on principles entirely different from those which regulate the *jus relictæ*. The former has no reference to any contract, either express or implied, but is entirely a question of succession, and consequently regulated by the law of the father's domicil at his death.

The marriage-articles are to be considered as a declaration by the parties, how far they wished their rights to be different from those constituted by the law of the place where they were then domiciled. They are framed upon the supposition, that the wife would otherwise have had nothing.

Even if they had been entered into in Scotland, they would have cut off the *jus relictæ*, upon the general presumption, that conventional supersede legal provisions; 24th February 1763, Macdonald against Mackinnon; 28th November 1781, Dalton against Riddell.

The Lord Ordinary having considered the contract of marriage, by which Mrs Hog was 'provided only to an annuity out of tenements to be purchased with a part of her own fortune, but had no provision made to her out of her husband's estate; found, That the claim of Mrs Hog's representatives is not excluded by her contract of marriage with her husband, &c.; but found, That when parties marry in one country, and afterwards remove to another, in which the legal rights of married persons are different, the change of domicile ought not to operate any change on any of the rights pre-established in them in the country in which they married; and that all those rights ought to be preserved and enforced by the law of the country to which they have removed, unless they be incompatible with the religion and morality of that country," and therefore repelled the claim.

Both parties reclaimed and a hearing in presence was ordered. When the cause was advised, a diversity of opinion took place; but a majority of the Court thought, that there was no occasion to determine what might be the effect of a change of domicile where there was no contract of marriage. The question here is, (it was observed), What was the understanding of parties in framing the marriage-articles? Both were domiciled in England, where the rights of husband and wife are accurately defined; the marriage-articles were meant to fix the amount of the wife's claim on the personal estate of her husband, and there could be no view to other claims which were not there provided for, and which probably were unknown to the parties and their men of business. The marriage-articles, indeed, contain, what, in the circumstances of the parties at the time, was a very rational provision for Mrs Hog.

The Lords "repelled" the claim.

A reclaiming petition was (7th July) refused without answers.

Lord Ordinary, *Dreghern.*

Act. Solicitor-General Blair, Jo. Clerk.

Alt. Dean of Faculty Erskine, Geo. Fergusson, M. Rojs, Honyman.

Clerks, Sinclair.

D. D.

N° LXXVII.

N^o CLXXVII.

June 17. 1795.

MANSFIELD, RAMSAY, and Company, and BAILLIE, PO-COCK, and Company.

A G A I N S T

SMITH, WRIGHT, and GRAY.

FORUM COMPETENS.—MULTIPLE-POINDING.—*An arrestment upon a summons of constitution, without a previous arrestment jurisdictionis fundandæ gratia, found to be a legal interest in a process of multiple-poining already in dependence, for the distribution of moveable effects belonging to a foreigner.*

PROCESS, MULTIPLE-POINDING.—*When a summons of constitution and arrestment on it have been produced as an interest in a multiple-poining, and an interlocutor has been pronounced, preferring the claimant, within year and day from the execution of the summons, it is not necessary that the summons should be called in Court.*

COMPENSATION, RETENTION.—BANKRUPT.—*The clerk of a Company, which was insolvent, but not legally bankrupt, having sold their effects and put the price into the hands of a banker, in consequence of a previous concert with him, on an account in his own name, “for the creditors of the Company,” the banker was found entitled to retain, for a debt due to himself, such a portion of the fund in medio as would have fallen to his share, if it had been divided among the whole creditors of the Company in proportion to the amount of their debts; but other creditors were preferred according to the priority of their diligences.*

JAMES KING, Joseph King, and Anthony Charleton, were engaged in a pottery concern at Newcastle, under the firm of James King and Company. They had likewise a warehouse at Leith, which was managed by a clerk.

In 1786 the Company became insolvent; and commissions of bankruptcy were issued against the Messrs Kings as individuals, but none against Charleton, or against the Company.

Upon this their manager at Leith, finding it impossible to carry on the business of the Company, applied for advice to Mansfield, Ramsay, and Company, bankers in Edinburgh, who were creditors of the Company to a large amount. By their advice he sold the goods

goods on hand, and lodged the price (amounting to above L. 200) with them, upon an account, in his own name, "for the creditors of James King, and Company."

In 1789, some English creditors of the Company raised a multiple-poinding, in the name of Mansfield, Ramsay, and Company, for the distribution of the sum in their hands. Appearance was made for the assignee under the commission of bankruptcy, and for various English creditors.

Smith, Wright, and Gray, bankers in London, were creditors of the Company, in a bill for L. 120. In September 1790 they executed a summons for payment of this bill; and upon its dependence used an arrestment in the hands of Mansfield, Ramsay, and Company. They then produced the summons and arrestment as their interest in the multiple-poinding.

The summons of constitution was never called in Court.

In January 1791 they obtained an interlocutor of the Lord Ordinary, preferring them on the fund *in medio*. Some farther litigation ensued: But a decree of preference, in their favour, was extracted in 1792.

Having then applied for payment to Mansfield, Ramsay, and Company, for whom no claim had been entered in the multiple-poinding, the latter brought a suspension and reduction of the decree of preference. Upon which Baillie, Pocock, and Company, likewise creditors of James King and Company, for whom no appearance had been made in the multiple-poinding, after using an arrestment *jurisdictionis fundandæ gratia*, executed a summons of constitution, (which was called in Court, and a decree in absence was obtained on it within a year from its date); and upon its dependence an arrestment in the hands of the pursuers of reduction; and upon this interest claimed to be preferred on the fund *in medio*.

In support of their claim, they, along with Mansfield, Ramsay, and Company,

Pleaded: 1mo, James King and Company, having neither residence nor landed property in Scotland, the summons of constitution executed against them, as out of the kingdom, by Smith, Wright, and Gray, and the interest founded on it, are void, as no arrestment *jurisdictionis fundandæ gratia* was previously executed against them.

2do, The sole object of an arrestment upon a depending action, is to keep the subject *in medio* until it can be attached by diligence on the decree afterwards obtained in the action, upon dependence of which it was founded. As, however, the summons in the present case was not called in Court within year and day from its execution, no decree can ever be pronounced on it; and, consequently, the arrestment of the defenders is ineffectual. And although an arrestment is competent upon a liquid ground of debt, without a depending action, the arrester is in no case entitled to a decree of preference or of forthcoming, until his document of debt be supported either by a previous decree of constitution, or at least of registration; Stair, b. 3. t. 1. § 36.

Mansfield,

Mansfield, Ramsay, and Company.

Pleaded: 3tio, If the fund *in medio* had been deposited with the pursuers, without any qualification as to the terms on which they were to hold it, they would have been entitled to retain the whole in extinction of the debt due to themselves. The Company, though insolvent, were not made legally bankrupt; and the transaction would not have been impeachable on the acts 1621 and 1696; and still less on the head of actual fraud. Since, therefore, the qualification, in the terms of deposition, is the circumstance which gives the other creditors of the Company any right to claim at all, they must allow it to be carried into full effect; and the pursuers, if not entitled to hold the money in their hands, as trustees for the whole creditors, must at least be entitled to retain, for their own debt, the sum which would have fallen to their share, had all parties concerned been in the field. Their not being allowed to do so would be unreasonable, as they could not attach, by diligence, a fund in their own possession.

Answered: 1mo, The sole object of an arrestment *jurisdictionis fundandæ gratia*, is to ensure, that the judgment pronounced in the subsequent action shall not be nugatory. It is, therefore, never required where the defender has a landed estate in Scotland. For the same reason, it was unnecessary in the present case, where the multiple-pounding, by placing the fund *in medio* under the jurisdiction of the Court, had anticipated its effect.

2do, Where the purpose of executing a summons is merely to produce it as an interest in a ranking of creditors, the production of it in the ranking is equivalent to its being called in Court. Besides, the arrestment might have proceeded on the bill itself, without a previous action; and it would be hard that a precaution, which was not essential, should be fatal to the diligence.

It is a mistake to suppose, that a decree of constitution was at all necessary in the present case. The production of an executed summons and arrestment gives a legal title to compete in a multiple-pounding. There all parties interested are in the field, and have an opportunity of canvassing the justice of the claims produced. The decree of preference is, therefore, to be considered as a general decree of constitution for all concerned. To oblige each creditor to constitute his debt apart, would be multiplying judicial procedure to no purpose.

3tio, It is admitted, that the Company was notoriously insolvent, and even that commissions of bankruptcy had been issued against two of the partners, before the fund *in medio* was lodged with the pursuers. It was therefore the duty of the Company to have kept their property in their own possession, subject to the diligence of their creditors, leaving it to them to acquire preferences, according to their activity. No trust-right granted by

nor any fees for attendance, until the termination of the disease, when both are regularly discharged; and that upon this footing, the pursuer himself had practised there during a period of twenty-five years.

The Commissary gave judgment against the defenders.

A bill of advocation having been passed, the defenders

Pleaded: It is a settled point, that physicians are not entitled to make any charge for attendance against the representatives of a patient, except for the 60 days immediately preceding his death; 7th February 1755, Park against the Representatives of Langlands. If this rule did not apply where the same person practised as surgeon and apothecary, as well as physician, it never would have been established, as, it is believed, the complete separation of these professions is but of modern date.

Answered: The general rule founded on by the defenders is a very proper one, wherever the professions of physician, and surgeon and apothecary, are kept distinct from each other, and the physicians are paid for their attendance at the time it is given, run no accounts with their patients, and give no discharges for their fees: But its application would be extremely unjust in a case like the present, where a mode, opposite in every respect, is adopted.

The general rule proceeds on the presumption, that fees for attendance have been already paid; and, like other legal presumptions, (*Dict. v. Presumption*), it must yield to a positive proof of the contrary; 15th June 1781, Hamilton against Gibsons. The account of medicines remaining unpaid, affords, of itself, conclusive evidence that the claim for attendance is equally well founded.

The Lord Ordinary "restricted the pursuer's claim for honours to 60 days previous to Mr Alexander's death."

The Court, however, upon advising a reclaiming petition, with answers, were clearly of opinion, that, in the circumstances of this case, the pursuer was entitled to make a reasonable charge for attendance during the whole period of Alexander's illness; and gave judgment accordingly *.

Lord Ordinary, *Stonefield*.
Faculty Erskine; Inglis.

A^c. Solicitor-General Blair; Monypenny.
Menzies, Clerk.

Alt. Dean of

D. D.

Of the same date, the Court pronounced a similar judgment in an action brought by Dr Melville of St Andrew's against the same defenders.

N° CLXXIX.

June 20. 1795.

JAMES COWAN,

AGAINST

WILLIAM KEY.

BILL OF EXCHANGE.—*When a bill, payable a certain number of days after date, is protested for non-acceptance, the holder may raise summary diligence against the drawer for recourse, before the term of payment.*

WILLIAM KEY, for value received, drew a bill in favour of Williamfon and Haig, for L. 50 Sterling, on Nixon, Hunter, and Nixon of London, dated 10th March 1795, and payable 90 days after date.

The bill was afterwards indorsed by Williamfon and Haig to Cowan and White, by them to James Cowan, and by him to Smith, Payne, and Smith, who, on the 28th April, presented it for acceptance, which being refused, they protested it against Nixon Hunter, and Nixon, for non-acceptance, and against the drawer and indorsers, for exchange, re-exchange, costs, &c. and immediately returned it, with the protest, to James Cowan, who, on the 23d May, gave Key, the drawer, a charge of horning upon it for payment.

A bill of suspension, presented for Key, having been refused, he, in a reclaiming petition,

Pleaded: Although the drawee should refuse to accept, the holder of the bill cannot have recourse against the drawer till it becomes due. It is not necessary, when a bill is made payable so many days after date, that it should be presented for acceptance; it is sufficient to present it for payment on the last day of grace; and if not honoured then, to protest it for non-acceptance and non-payment; Kilkerran *voce* Bills of Exchange, No. 23. 28th June 1749, Jamieson against Gillespie. But, if a protest for non-acceptance vested in the holder a right of such importance, as

that of immediate recourse against the drawer and indorsers, it would in all cases have been made indispensable.

Besides, when an obligation is made prestable on a particular day, as in the present case, the day is held to be adjected in favour of the debtor, and the creditor cannot demand performance till it arrive.

Answered: The drawer of a bill undertakes that it shall be accepted whenever it is presented for that purpose; Bayley on Bills of Exchange, p. 11. If this, therefore, is refused, there is a failure in his obligation which subjects him to immediate recourse. Accordingly, where acceptance is refused, summary diligence, before the day of payment, is declared competent against the drawer and former indorsers; 1681, c. 20, 1772, c. 72. See also Forbes on Bills of Exchange, p. 177, and 178. The law of England, also, in this case, gives immediate recourse to the holder of the bill, Bayley, p. 42; Lovelass on Bills of Exchange, p. 67.

The Lords were clearly of opinion, that the charge was authorised by the statutes 1681 and 1772, and unanimously ‘adhered.’

Lord Ordinary, *Metbuen.*
Hume, Clerk.

For the Charger, *Cullen.*

Alt. *W. Robertson.*

R. D.

N° CLXXX.

N^o.CLXXX.

June 20. 1795.

ALEXANDER JACK,

AGAINST

The Earl of KELLIE.

REMOVING.—*It is sufficient for the tenant of a house in Edinburgh to intimate to the landlord his intention of removing forty days before Whitsunday.*

MRS PITCAIRN had for many years possessed a house in the Canongate of Edinburgh, belonging to Alexander Jack, for which she paid rent at Whitsunday and Martinmas.

She died on the 23d February 1794; and next day the agent for the Earl of Kellie, her representative, intimated to the landlord his intention of giving up possession of the house at the ensuing Whitsunday. Alexander Jack insisted, that as warning of an intention to remove had not been given at Candlemas, the Earl was liable for the rent of the next year; and a bill of suspension, presented by his Lordship, having been refused, he, in a reclaiming petition,

Pleaded: It is a settled point, that a landlord within burgh may remove his tenant upon giving him warning forty days before the term of removal; Stair, b. 2. tit. 9. § 40.; Bankton, vol. ii. p. 109. § 52.; Erskine, b. 2. tit. 6. § 47. By the same rule, it must be competent to the tenant to leave the possession upon giving the like notice to the proprietor. It is indeed common for tenants to pay the rent due at Martinmas at the Candlemas following, and for the parties then to settle as to the possession for the ensuing year; but the landlord, in the present case, had no rent to receive at that term, and had no communication with his tenant.

Answered: It is the uniform practice in Edinburgh and its suburbs, for the tenant who means to remove at Whitsunday to give intimation to the landlord at the Candlemas preceding, and for the landlord to give similar warning when he means to resume possession of his property. Accordingly, it is immediately after that term that houses let to most advantage; and it becomes a fair presumption, when no intimation of an intention to change is given on either side, that the contract is renewed for another year. In such cases, therefore, there can be no room for applying

ing the general rule of law with regard to warnings; and least of all in the present case, where, from the tenant's long continuance in possession, the landlord had no reason to presume, and it cannot be pretended that the tenant had formed, an intention of removing.

The Lords, upon advising the petition, with answers, being of opinion that the notice was sufficient, remitted to the Lord Ordinary to pass the bill of suspension.

Lord Ordinary, *Dreghorn*. For the Suspenders, *Rolland*. Alt. *Forfytb*

D. D,

N° CLXXXI.

July 3. 1795.

WILLIAM KEITH, Trustee for the Creditors of Thomas Anderson,

AGAINST

JAMES THOMSON and SON.

PERICULUM.—INSURANCE.—*An underwriter having become bankrupt while certain risks were in dependence, the premiums for which had not been then paid by the insured; and the broker, at whose office these risks had been undertaken, having, of his own accord, reassured them for behoof of all concerned, at a lower rate than that originally stipulated, he was found entitled, in accounting with the creditors of the original underwriter, to set off the second premiums in compensation of the first, payment of which he had by that time received from the insured, and to be debtor to the creditors only for the balance.*

UPON the bankruptcy of Thomas Anderson, there were policies of insurance underwritten by him to the extent of L. 1020, at the office of James Thomson and Son, insurance-brokers in Edinburgh, the risks of which were undetermined.

No part of the premiums upon these risks, amounting to L. 36, 17s. 5d. was received by James Thomson and Son, from the insured, for several months afterwards.

Immediately on Anderson's bankruptcy, James Thomson and Son, without consulting either his creditors or the insured, opened, "for behoof of the insured in said policies, and all others concerned," a policy for covering the same risks, which was filled up for the premium of L. 30 : 13 : 4.

The loss upon these risks, which was L. 75, was paid by the second insurer.

Anderson's

Anderfon's creditors have as yet drawn only 2 s. a-pound of the sums due them.

James Thomson and Son were accustomed to charge the underwriter, upon the gross amount of the premiums, 5 *per cent.* of brokerage; 2½ *per cent.* for commission; and, 2¼ *per cent.* for guaranteeing the premium.

In an action brought by the trustee for Anderfon's creditors against James Thomson and Son, they gave credit for L. 36, 17 s. 5 d. the amount of the original premiums, which they had by that time received from the insured; and, on the other hand, they took credit for the L. 30 : 13 : 4, which they themselves had paid to the second insurer. The pursuer

Objected : The presumption of law is, that the premium is in possession of the broker, for behoof of the underwriter at the signing, of the policy, which, according to common style, contains a discharge from the latter to the insured for payment of it. The broker, indeed, does not immediately pay it over to the underwriter; but so much is it understood to be at the risk of the former, that at the annual settlement of accounts which takes place between them, he gives the underwriter credit for it, even although he should not have recovered it from the insured. And accordingly the charge made by him corresponds to the risk he undertakes. The amount of the original premiums, therefore, in the present case, was just so much money due by the defenders to Anderfon at his bankruptcy, and they had no right to dispose of it afterwards, without express authority from his creditors.

But farther, the transaction in question was both illegal in itself, and detrimental to the creditors. The second insurance must either have been made for behoof of Anderfon and his creditors, or for behoof of the insured. If for behoof of the former, it was what is called a re-assurance, which by 19th Geo. II. c. 37. § 4. is lawful only when the insurer becomes bankrupt, or dies, and can be made only by himself, "his executors, administrators or assigns;" none of which characters belonged to the defenders. If, on the other hand, the second insurance was for behoof of the insured, or, in other words, was a double insurance, the premium must be paid by the insured. If no second insurance had been made, the creditors would have received full payment of the original premium from the broker, and the insured would have ranked as ordinary creditors for the loss sustained by them; and as Anderfon's funds have yielded only 2 s. a-pound, for L. 75 they would have drawn only L. 7, 10 s.; so that the creditors lose above L. 20 by the transaction, while a partial preference is given to the insured.

Answered : In insurance, as in all mutual contracts, one party cannot demand performance, without being himself ready to execute the counterpart of the obligation: and therefore, as the premium is the consideration paid for the risk undertaken by the underwriter, if, in consequence of a change in the destination of the vessel, the policy is vacated; or if, from the bankruptcy of

the underwriter, he is unable to indemnify for the loss, the insured must be entitled to recover the premium, if paid, and to retain it, if still in his own possession. The obligation of the broker to guarantee the payment of it, holds only where the underwriter is himself *in titulo* to demand it from the insured.

By the practice of Edinburgh, the insured do not pay the premium till the risk be determined. Any argument to the contrary, drawn from the words of style employed in the policy, (which are very inaccurate), must yield to the fact; and, accordingly, it has been found, that if the underwriter, in the meantime, become insolvent, the insured are entitled to insure anew, and retain the original premium; 28th June 1785, Creditors of Elliot. By the practice of England, the premium is paid at the signing of the policy, and therefore, there can be no question of retention in that country: But, precisely on the same principle, the insured are entitled to rank for the premium; *Weskett voce* Insurer, § 6.; *Magens*, vol. i. p. 83. 94.; *Park*, p. 371. and the same is the law of other mercantile countries; *Weskett voce* Bankrupt; *Magens*, vol. ii. p. 137. 233. 272. In England, too, before the 19th of Geo. II. c. 32, the insured could in no case rank on the estate of an underwriter for a loss arising after the date of his bankruptcy; but they were entitled to rank for the premium which they had previously paid; and if it had not been paid, it cannot be supposed that they were obliged to throw it into a fund from which the law allowed them to draw no dividend for their contingent loss.

The present case is the same as if the second insurance had been made by the insured themselves, (which would clearly have been a legal transaction; *Magens*, vol. i. p. 94; *Park*, p. 276.), with this difference, that the creditors have been allowed the difference between the two premiums, which, however, they owe to the acquiescence of the insured.

If no second insurance had been made, the insured would have been entitled to retain the premium as a partial security for the contingent loss upon L. 1020, and have ranked for the balance; and as the loss turned out to be L. 75, they would have had the same right of retention which they claim at present, and yet been entitled to draw a dividend for about L. 40.

The Lord Ordinary found, " That the premiums of the first insurance in question were unpaid, in the hands of the insured, at the period of Anderson's bankruptcy. Found, That after his bankruptcy, and when he was unable to make good the loss, if any should be sustained, it was not competent either for him or the trustee, to make good the premiums against the insured: And, in respect that the defenders debit themselves with the premiums for the first insurances, and which are greater than the premiums for the second insurances, found, That when they take credit for the premiums paid for the second insurances, no injustice is thereby done to Anderson and his creditors: And, therefore,

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“ therefore, upon the whole, found, That they are entitled to retain, out of the sum in their hands, the premiums paid for the second insurances.”

The Lords, upon advising a reclaiming petition and answers, “ adhered.”

Lord Ordinary, *Justice-Clerk.*
Home, Clerk.

Act. Tait.

Alt: John Clerk.

D. D.

N^o CLXXXII.

July 8. 1795.

WILLIAM KEITH, Trustee for the Creditors of John Sym ;

A G A I N S T

J O H N M A X W E L L .

BANKRUPT.—Act. 1696. c. 5.—*The discharge of a back-bond, qualifying an absolute disposition, reduced upon the act 1696.*

ON a settlement of accounts between Mr Constable and the late John Sym, writer to the Signet, his agent, there was a balance of L. 6000 against the latter, for which it was concerted, that he should grant a bond to John Maxwell, one of Mr Constable's commissioners, which he accordingly did, on the 3d December 1779.

Maxwell, a few days after, granted a back-bond to Mr Constable, declaring, that the bond, though *ex facie* simply in his favour, was truly granted to him in trust for Mr Constable.

And on the same 3d December 1779, Sym likewise granted an absolute and irredeemable disposition of the lands of Barncailzie, and others, to Maxwell ; who, on the other hand, on the 6th of that month, granted a back-bond to Sym, declaring, that the disposition was granted only in security of the bond for L. 6000, and therefore he obliged himself, whenever it was paid, to redispone the lands to Sym.

Maxwell

Maxwell was infeft on the difpofition, 17th February 1781; and his feifin recorded 17th April thereafter. But Sym, till his death, remained in poffeffion of the houfe and parks of Barncailzie.

Soon after this tranfaction, Sym's affairs fell into diforder; and on 12th June 1781, he was obliged to retire to the fanctuary.

Upon this, one of his creditors brought a reduction of the difpofition and infeftment in favour of Maxwell; and in this procefs, in which the purfuers ultimately failed, the back-bond, granted by Maxwell was produced, and the whole tranfaction laid open.

The whole debts on which the diligence againft Sym had proceeded were afterwards paid, and he continued till his death to do bufinefs on a narrow fcale, but he was never again folvent.

Maxwell having, on 31ft December 1788, become cautioner for Sym in a cash-account for L. 500, the latter, of the fame date, executed in his favour a bond of relief, in which he narrated the difpofition granted by him to Maxwell, and the back-bond he had received from him; and declared, that the faid difpofition fhould fubfift not only in fecurity to Mr Conftable of his debt of L. 6000, but alfo in fecurity to Maxwell himfelf, for the confequences of his cautionary obligation; and to that extent, he difcharged the back-bond.

Maxwell having, after Sym's death, paid a large balance due on the cash-account, he claimed a preference for it over the fubjects contained in Sym's difpofition, in virtue of the reftriction of his own back-bond.

The trustee for Sym's creditors brought a reduction of his fecurity on the act 1696 c. 5.; 1^{ft}, Because the reftriction of the back-bond was obtained feveral years after Sym had been rendered bankrupt; 2^{dly}, Because it was granted in fecurity of a future debt.

In defence, Maxwell

Pleaded: Sym's bond of relief being of the fame date with the bond of credit, the defender's debt is a *novum debitum*, to which the act 1696 does not apply.

Neither does his fecurity fall under that ftatute, as being for a debt to be contracted in future. It arifes from an abfolute difpofition, qualified by a back-bond; and securities, although for future debts, when taken in that fhape, are not affected by it; 16th February 1782, Riddel againft Creditors of Nibblie.

Befides, it is not the difpofition and infeftment which is now fought to be reduced, but the reftriction of the defender's back-bond, which being a perfonal deed, in no fhape falls under the act 1696, the enactments of which are directed only againft infeftments in fecurity of future debts.

Answered:

Answered: An absolute disposition, qualified by a back-bond, is supported; because, *ex facie* of the records, the disponer is wholly divested of the property, and no creditor will contract with him on the faith of it. But this will not hold in the present case, where Sym was not only allowed to remain in the house of Barn-cailzie, but where the back-bond, before the defender obtained the restriction of it, had been judicially produced, which made it publicly known that the lands were held in security only for a specific debt of L. 6000, and that the reversionary value, still belonging to Sym himself, was consequently a fund on which his creditors might rely for payment.

Besides, as the defender originally held the infestment solely in trust for Mr Constable, he could not invert the nature of his right, so as to make it a security for a private debt of his own, to the prejudice of Sym's other creditors, especially after his bankruptcy, as from that time he was not entitled to give partial preferences.

Replied: As the disposition and infestment were sustained in the process where the restriction of the back-bond was produced, the defender, so far from conceiving himself to be put *in mala fide* by it, was confirmed in the belief that he was safe in accepting the security which that right afforded. If Sym's other creditors discovered his reversionary interest by means of that action, they ought, if they counted upon it, to have immediately secured it, by inhibiting Sym, or adjudging the back-bond.

Neither will it avail the pursuer, that the infestment was originally granted only in security of a debt due to Mr Constable. The defender, from the beginning, had an unqualified feudal right to the lands in his person. Mr Constable's interest was secured by a separate back-bond from him, which he might have destroyed without the consent of Sym or his creditors. Sym might have sold the lands to the defender; and if he had done so, the sale would have been completed by a simple discharge of the back-bond. And if a total discharge of it would have effectually vested him with the full property, the discharge which he obtained, must give him an effectual right, corresponding to its extent.

The Lord Ordinary, "in respect that the bond of relief 1788, discharging, *pro tanto*, the former back-bond, was granted *unico contextu* with the bond of credit for L. 500 to Sir William Forbes and Company, found, That the foresaid deed is not struck at by the first clause in the statute 1696; and in respect that the deed 3d December 1779, is, *ex facie*, an absolute and irredeemable disposition of the lands, but qualified by a relative back-bond, found, That that disposition and infestment does not fall under the second clause of the statute 1696, but must subsist in favour of Mr Maxwell, until he is relieved of his engagements for Mr Sym, whether prior or posterior to the date of the infestment; and, therefore, upon the whole, assilzied Mr Maxwell from the reduction."

On considering a reclaiming petition and answers, the Court, thinking the case attended with difficulty, ordered memorials.

When the cause came to be advised, it was

Observed on the Bench: After the judicial production of the back-bond, it was just as well known to Sym's other creditors, that the disposition was granted solely for the purpose of securing Mr Constable's debt, as if a clause to that purpose had appeared *in gremio* of it. From thenceforward, therefore, the disposition is to be considered in no other light than as a security; and, consequently, Mr Constable himself could not have covered, by means of it, any future advances he might have made to Sym, and far less could the defender, whose only interest in the disposition was in the character of Mr Constable's trustee. The restriction of the back-bond, therefore, falls to be reduced, and that without at all infringing on the doctrine fixed by the case of Riddel against Nibblie.

The Court, accordingly, by a considerable majority, "reduced, "decerned, and declared in terms of the libel, in so far as respects the security therein mentioned, granted in favour of John "Maxwell."

And on advising a reclaiming petition and answers, they unanimously "adhered."

Lord Ordinary, *Justice-Clerk.*
Alt. Geo. Fergusson, Mat. Ross.

A&S. Rolland, Hay, Maxwell-Morrison.
Clerk, Pringle.

R. D.

DECISIONS

OF THE

COURT OF SESSION.

N° CLXXXIII.

November 13. 1795.

JEAN ANDERSON and her Children,

AGAINST

JOHN FULLERTON and others.

PROOF.—A holograph letter discovered in a gentleman's repositories at his death, in which he declared himself the husband of his housekeeper, who had long cohabited with and born children to him, found not to be sufficient evidence of marriage.

JEAN ANDERSON lived with Mr George Fullerton many years as his housekeeper. During that period she bore children to him, some of whom survived him. The children and their mother were treated by Mr Fullerton with much kindness and affection. The latter had the complete direction of his family; sat in the room and at table with him, even when there were strangers present, and occasionally rode out in the carriage along with him; but she uniformly went by the name of Mrs Anderson. The children not only received the same marks of attention with their mother, but were allowed to assume their father's name, and sometimes visited along with him.

Mr Fullerton was taken suddenly ill, and became insensible on the 19th April 1791, and died on the morning of the 21st. His repositories were immediately sealed up. The keys were left with Mrs Anderson, who had had possession of them during Mr Fullerton's illness,

illness, and one of the servants observed her open his desk in the course of it.

In the interval between his being taken ill and the opening of his repositories after the funeral, Mrs Anderson mentioned to several of her friends, that there would be found in Mr Fullerton's desk, along with some bonds of provision to the children, a letter, in which he declared himself to be her lawful husband; she further told them, that, after writing that letter, Mr Fullerton gave it her to read; and that after doing so, and declaring herself satisfied, she had, at his desire, put it in the place described by her.

The following letter, holograph of Mr Fullerton, was accordingly found in his desk:

" Customhouse, Leith, 16th April 1791.

" My dear Jean Anderson,

" As you and I have cohabited together as man and wife for upwards of twenty years, (though pride and connections prevented my declaring to the world that you was my wife), yet, on account of your unspeakable attention to my health, and interest in my family affairs; and, above all, the love I bear to you and the three children you have born to me, viz. Margaret, Jean, and Maria Fullertons, your and my daughters, I think it a duty incumbent on me to subscribe, what I truly am, My dear Jean, your affectionate husband.

" GEO. FULLERTON."

This letter was wrapt round a sealed packet, marked, " Not to be opened till after the decease of George Fullerton." The packet contained two bonds, (the one of them dated in 1785, the other in 1789), by which L. 1500 were provided to Mrs Anderson in liferent, and his children by her in fee. In these bonds she was described as his servant; and it was declared, that the provision then made for her should not supersede her claim for wages due to her at his death. The bonds likewise contained a nomination of tutors and curators to the children.

Mrs Anderson and her children having brought a declarator of marriage and legitimacy against John Fullerton and others, the heirs at law of Mr Fullerton, a proof was led; the import of which has been already stated.

The Commissaries at first sustained the marriage; but they afterwards gave judgment in favour of the defenders; and a bill of advocation having been presented, the Lord Ordinary ordered informations, in which the pursuers

Pleaded: To constitute a marriage by the law of Scotland, all that is required is evidence of the deliberate consent of parties, to enter *de presenti* into that connection; Stair, b. 1. tit. 4. § 6.; Erskine, b. 1. tit. 6. § 2. 4. 5. 6. This consent may be implied from their

their conduct, and, with more security, it may be established by an express declaration made before witnesses, or in writing; Bankton, b. 1. tit. 5. § 24.; 3d March 1786, Inglis against Robertson, affirmed on appeal 14th February 1787.

As evidence of that consent, in the present case, there is produced a declaration in writing by Mr Fullerton, which may be considered either as an acknowledgment of a fact which had already taken place, or as constituting the matrimonial consent from its date; a consent which the situation of the parties makes it very probable was then mutually declared. If Mr Fullerton had been alive, and made a similar declaration before witnesses, no further evidence could have been required, and it would have been irrevocably binding on him. The letter was written by Mr Fullerton, after mature deliberation, for the express purpose of affording such evidence, in case the fact should ever afterwards be disputed.

Further, the letter was not only communicated to the person to whom it was addressed, but in effect delivered to and accepted of by her; indeed, the delivery of it is, independently of other circumstances, implied from its being found in the desk of Mr Fullerton, to whom, as her husband, the custody of all deeds in which she was interested naturally belonged.

Answered: The letter in question cannot be founded on as an acknowledgment of a marriage already constituted, because, in that view, it is contradicted by the whole circumstances of the case, from which it is evident that no marriage had previously taken place; and indeed the terms of the letter shew the conviction of the granter, that the execution of it was necessary to establish a marriage.

Nor is that writing, *per se*, sufficient to constitute a marriage, as that can only be done by the mutual act of the parties, whereas the letter in question was binding upon neither. It was not binding on Mr Fullerton, because, while it remained in his possession, it was completely at his disposal, and afforded proof merely of an intention not carried into execution during his life, and he certainly could not bequeath Mrs Anderson the character of his wife as a legacy. On the other hand, there is as little evidence of her consent. Her knowledge of the existence of the letter may have arisen, not from a deliberate communication on his part, but from her having had access to Mr Fullerton's repositories during his last moments. Had she known of it sooner, or, at least, had she considered it as constituting a marriage, she would have immediately mentioned it to her friends, and assumed Mr Fullerton's name, and the character of his wife. Its ever having been in her possession rests entirely upon her own averment, and is improbable in itself; because, if it had been delivered to her, she would have been too sensible of its importance ever to have given it up; and before she can found on the letter being discovered in Mr Fullerton's desk as equivalent to being in her own possession, she must establish, *aliunde*, that he was her husband.

As,

As, therefore, she had had no opportunity of declaring her acceptance of the letter, it would not have prevented her from marrying another person during Mr Fullerton's life; nor, had the present defenders found it for their interest to raise a declarator of marriage against her, and she thought proper to oppose them, would it have entitled them to a judgment in their favour; see 18th November 1766, Johnston; 1771, Wallace against Ballantyne*; and surely her adopting a different line of conduct since Mr Fullerton's death cannot affect the question.

When the cause was advised, some of the Judges thought that the letter, when taken in conjunction with other circumstances, afforded sufficient evidence that a marriage had been constituted during the lifetime of Mr Fullerton. The woman's being in the knowledge of its execution, (it was said), was equivalent to its being delivered to her; at any rate, as it was merely a declaration of a fact which had already taken place, delivery was not essential; and, even if considered as constituting a marriage *de presenti*, her acceptance of it was to be presumed.

A great majority of the Court were of an opposite opinion. As the law of Scotland (it was observed), requires no definite form for the constitution of marriage, it becomes necessary to attend to the views of parties in each case. In the present case, Mr Fullerton meant to do what the law cannot sanction: His pride prevented him from making Jean Anderson his wife, but he wished to bequeath to her the *status* of his widow, with a view to legitimate the children. While the letter, however, remained in his possession, it was revocable, and was binding on neither party, and therefore it does not signify whether its execution was or was not communicated to Mrs Anderson.

The bill of advocacy was refused.

Lord Ordinary, *Abercromby*.

A&C. *D. Cathcart, Inglis*.

Alt. *M. Ross*.

D. D.

N° CLXXXIV.

* Not yet collected.

N^o CLXXXIV.

November 17. 1795.

Mrs JANE ANN DOUGAL, Executrix of Dr Dougal;

A G A I N S T

J O H N G O R D O N.

COMPENSATION.—RETENTION.—*A creditor holding a bond in consequence of an assignation from his debtor, ex facie absolute, is not obliged to reconvey it to the cedent, till he be repaid advances made by him to the latter, subsequent to the date of the assignation, although by a missive granted by him to the cedent of the same date with the assignation, he declared it to have been granted only in security of certain debts then due to him.*

INNOVATION.—*Does the renewal of a bill operate as a novatio debiti?*

ASSIGNATION.—*Is it sufficient to intimate an assignation to the confidential man of business of the debtor when he himself is abroad?*

PROOF.—*How far does the holograph acknowledgment of the intimation of an assignation prove its own date?*

DR DOUGAL, in 1789, granted to John Gordon, for value, two bills, one for L. 200, and the other for L. 145. He likewise accepted a bill payable to John Innes for L. 145, 18s.

In security of these bills Dr Dougal and his wife executed in favour of Mr Gordon, an assignation, *ex facie absolute*, of a bond, due to them by Alexander Seton, for 3500 rix dollars of Sweden, equal to L. 777 : 15 : 6 Sterling.

Mr Seton, the debtor in the bond, was a Scotsman, but had lived chiefly in Sweden for many years before. He had, however, a considerable estate in this country where he occasionally resided.

Of the same date with the assignation, Mr Gordon granted a letter, acknowledging that he had received it in security of the debts above-mentioned.

The two bills granted by Dr Dougal to Mr Gordon were afterwards twice renewed, and the interest and expence of stamps included in new bills. These renewals took place on the 15th May 1790, when the original bills fell due; and on the 22d November 1790, when a further advance of L. 12 made by Mr Gordon to Mrs Dougal on the 6th August was included in them; and on the 2d December following, Mr Gordon advanced Dr Dougal a further sum of L. 12 Sterling.

In July 1791, Dr Dougal died insolvent.

Upon the assignation there was the following note, holograph of John Dundas, writer to the Signet:

5 T

6th

6th December 1790.

I hold this assignation intimated to me as agent for Alexander Seton of Preston.

JOHN DUNDAS.

It appeared, that Mr Dundas, besides managing Mr Seton's law affairs, received and paid away large sums on his account, and was in all respects his confidential man of business. He acted, however, without any written authority, while Mr Taylor in Linlithgow, Mr Seton's factor, who paid his rents to Mr Dundas, had a written commission from him for managing his affairs, containing very ample powers, but which he had never exercised to any greater extent than as an ordinary factor in the country.

It further appeared, that on 16th April 1790, Mr Dundas wrote Mr Seton, then in Sweden, informing him, that the bond had been assigned to Mr Gordon; and Mr Seton having himself come to this country in autumn 1791, Mr Gordon, in October, wrote to Mr Dundas, expressing a wish, that Mr Seton would pay the bond at the following Martinmas. Mr Dundas on the 5th November answered, that Mr Seton would do so; and accordingly, in February 1792, a discharge of it was made out by Mr Dundas, which was signed both by Mrs Dougal and Mr Gordon.

Before payment, however, James Saunders, a creditor of Dr Dougal, brought an action against Mrs Dougal, libelling on the passive titles; and on 16th and 17th February 1792, he used an arrestment on the dependence in the hands of Mr Seton and Mr Dundas, of part of the sum contained in the bond.

Mr Saunders failed in instructing any passive title against Mrs Dougal, and only obtained a decree against her *cognitionis causa*.

Mrs Dougal, on the 10th April 1792, got herself confirmed executrix of her husband *qua* relict; but the inventories given up by her contained only some medicines and household-furniture.

Mr Seton, in May 1792, brought a multiplepoinding, in which he called Mrs Dougal, and all the parties having interest in the bond.

Mr Gordon having, in May 1793, produced as his interest the bills above-mentioned, and his assignation, Mrs Dougal, as executrix of her husband, and in behalf of his other creditors,

Objected: 1mo, Assignations must be intimated to the debtor personally, if within the kingdom, and edictally when he is abroad; Ersk. b. 1. tit. 6. § 14. The assignation in question is therefore incomplete, from its not having been intimated to Mr Seton, the debtor in the bond, but merely to his agent Mr Dundas.

It is true, Mr Dundas seems to have informed the debtor of the assignation, but this could not supply the want of actual intimation, which is essential to complete the right of the assignee. Private knowledge has not even the effect of putting the debtor in *mala fide* to pay to the cedent; Fount. 12th March 1684, Castles; Dict.

Dict. vol. i. p. 65. Earl of Aberdeen against the Creditors of Merchiston*.

2dly, Although the note by Mr Dundas were to be held sufficient evidence of intimation, yet, as holograph writings do not prove their dates, it must be held to have been granted after the arrestment used by Mr Saunders; Dirlton, No. 201; Fount. 22d July 1708, Earl of Selkirk against Gray.

3dly, Even admitting the assignation to have been in all respects duly intimated at the date of Mr Dundas's acknowledgment, it would give no preference to Mr Gordon. It appears from his missive to Dr Dougal, that the assignation was granted to him in security of the bills which he and Mr Innes got from the Doctor in 1789. But by the subsequent renewal of these bills, there was a complete novation of the debt; and it is an established rule of law, *novatione legitime facta liberantur hypotheca et pignus*; 30th June 1752, Duke of Norfolk; besides, in this case, a new debt of L. 12, and the bygone interest on the old bills, are included in these now founded on; so that there is here not merely a change of one obligation for another, but a radical alteration in the nature and substance of the debt.

Answered: 1st, The intimation of an assignation to the debtor's factor has been sustained, even where the debtor was in this country; Decision in House of Peers, Earl of Aberdeen against Creditors of Merchiston, and much more ought it to be so where he is abroad. Besides, any step taken by the assignee by which the debtor is put in *mala fide* to pay the cedent, has the effect of completing his own right; Durie, 31st March 1624, Dunipace; Stair, b. 3. t. 1. § 7.; and the assignation was virtually intimated to Mr Seton by the subsequent transactions.

2dly, The rule, that holograph writings do not prove their dates, admits of various exceptions; and, in particular, the holograph acknowledgment of an intimation has been repeatedly found probative of its date; Durie, 22d January 1630, Macgill against Hutcheson; Dict. vol. i. p. 65. Earl of Aberdeen against Creditors of Merchiston; 23d November 1785, Newton and Company; besides, the assignation was sufficiently intimated by its production in this action, which is enough to secure Mr Gordon's preference, as the bond assigned has not yet been habilely attached by any competing diligence; for Mr Saunders's arrestment is inept, as proceeding on an action against Mrs Dougal before her confirmation, and which, accordingly, resulted in a decree *cognitionis causa tantum*; Ersk. b. 3. t. 6. § 8.; Dict. vol. i. p. 58.

3dly, There was no *novatio debiti* in this case. The original debt due by Dr Dougal still remains unextinguished, although the vouchers of it were changed for his accommodation. It is evident, that novation was not intended by either party; and the law is so far from presuming it, that even an *animus novandi* is not sufficient, unless it be explicitly declared; Voet, lib. 46. t. 2. § 4, 5, 6.; 1st March 1781, Bank of Scotland against Bank of England; 2d August 1781, Ranking of the Creditors of Cult; 25th February 1785, Rutherford; 24th July 1785, Douglas, Heron and Company.

Besides,

* This decision was reversed on appeal.

Besides, although a *novatio debiti* had taken place, as the assignation is *ex facie* absolute, Mr Gordon would have been entitled to retain it till he was paid this new debt. Mr Gordon held Dr Dougal's residuary interest in the bond, after the debts mentioned in the letter were satisfied, in trust for his behoof; and a trustee, coming under engagements for the truster, cannot be compelled to denude till he be repaid or relieved.

Or, even admitting that the original contract between the parties was that of pledge, and that a novation of the debt took place, still the rule of law, *liberantur hypothecæ et pignus*, only applies where there is a second creditor, to whom the same thing has been pledged; but the debtor himself, or his personal creditors, cannot demand back the pledge, till not only the original debt, but every other debt due to the *creditor hypothecarius* is paid; *Voet, l. 20. t. 6. § 16.*; *Cod. l. 8. t. 27.*; Forbes, 14th February 1708, Fount. 1st July 1709, Strachan.

The Lord Ordinary "found no sufficient grounds for sustaining the claim of preference made by John Gordon."

On advising a reclaiming petition and answers, the Court were clear, that Mr Saunders's arrestment was inept, and that, as Mrs Dougal had not confirmed the bond, the production of the assignation in the multiplepoinding, which was equipollent to intimation, gave Mr Gordon a preferable right to either of these parties. They consequently had no occasion to determine as to the legality of the intimation to Mr Dundas.

Neither had they occasion to decide how far the renewal of the bills operated as a *novatio debiti*; a great majority of the Judges being clear, that admitting the renewed bills to be a debt contracted subsequent to the assignation, yet as the assignation was *ex facie* absolute, and as the bond had not been attached by any of Dr Dougal's creditors, before the renewal of these bills, Mr Gordon was not bound to reconvey it till they were paid.

The Court, (11th June 1794.) "in respect the assignation founded on by the petitioner (Mr Gordon) is absolute in favour of Mr Gordon, preferred him for the payment of his debt upon the fund *in medio*."

And, on advising a reclaiming petition for Mrs Dougal, with answers, &c. the Lords adhered.

Lord Ordinary, Craig.

Alt. Solicitor-General Blair, Mat. Ross, John Clerk.

Act. Dean of Faculty Erskine, Tait.

Clerk, Gordon.

R. D.

N° CLXXXV.

N^o CLXXXV.

November 17. 1795.

Mrs ELIZABETH CRAWFURD,

AGAINST

THOMAS COUTTS.

DEATHBED.—APPROBATE AND REPROBATE.—*A disposition on deathbed found to exclude the heir at law where the granter, while in liege poustie, had executed a former settlement in favour of a stranger, containing reserved powers to alter on deathbed.*

THE late Colonel Crawford, in 1771, executed an entail of his estate of Crawfordland, in favour of “himself in liferent, “and to the heirs-male lawfully to be begotten of his body; “whom failing, to Sir Hugh Crawford of Jordanhill, Baronet, and “the heirs-male lawfully begotten, or to be begotten, of his body; “which failing, to the heirs-male lawfully begotten of the now “deceased William Crawford, merchant in Glasgow, his cousin; “which failing, to the heirs-male lawfully begotten of the also “deceased John Crawford, late surgeon in Glasgow, his brother; “whom all failing, to his own nearest heirs and assignees whatsoever.”

This deed contained a clause, reserving power to the granter, “at any time of his life, *et etiam in articulo mortis*, to alter, “innovate, annul, and make void these presents, either in whole “or in part, and to infringe upon, or totally change the foresaid “series of heirs, or course and order of succession above devised.”

On 13th February 1793, Colonel Crawford, while on deathbed, executed a gratuitous disposition of the same lands in favour of Thomas Coutts. This deed likewise reserved the granter’s liferent, and power to revoke even on deathbed. It also contained the following clause: “And I hereby revoke and recal all former “dispositions, assignments, or other deeds of a testamentary nature, formerly made and granted by me, to whatever person or “persons, preceding the date hereof, and particularly a deed “granted by me in the year 1771, settling my estate upon Sir “Hugh Crawford of Jordanhill, Baronet, and his heirs; and I “declare the same to be void and null, so far as these deeds are “conceived in favour of the persons to whom they are granted, “but to be valid and sufficient to the extent of the powers therein “reserved to me, to revoke, alter, or innovate the same, to the effect only of making these presents effectual in favour of the said “Thomas Coutts and his forebears.”

5 U

Colonel

Colonel Crawford died 19th February 1793.

Mrs Elizabeth Crawford, the Colonel's heir of line, brought a reduction of both settlements, contending, that the deed 1771, in so far as it was conceived in favour of Sir Hugh Crawford, and the other strangers thereby called to the succession, was revoked by the deed 1793, and that this last fell under the law of deathbed.

Sir Hugh Crawford was dead, and no appearance was made for his heir.

In defence, Mr Coutts

Pleaded: The pursuer's right, as heir at law, was effectually cut off by the entail made by Colonel Crawford, while in *liege poustie*. The disposition 1793, therefore, in the defender's favour, executed in virtue of the reserved powers of altering or revoking *etiam in articulo*, contained in the former deed, is not reducible on the head of deathbed; because, although to the prejudice of the disponces under that settlement, it does not hurt the heir at law, at whose instance alone a challenge *ex capite lecti* is competent; *Stat. Wilb.* c. 13.; Dirlton, *voçibus* Faculty to alter; Reduction, *ex cap. lecti*.; and Stewart's Answers; Stair, b. 3. tit. 4. § 2.; Erskine, b. 3. tit. 8. § 98.; Bankton, b. 3. tit. 2. § 20.; b. 3. tit. 4. § 48.; Stair, 25th January 1677, Ker; Clerk Home, 16th January 1740, Mackean; 9th December 1762, Duke Hamilton; 22d November 1775, Rowan; 20th July 1776, Donaldson*.

Answered: 1st, Although Colonel Crawford might, on deathbed, revoke the deed 1771, in so far as it was granted in favour of persons not *alioqui successuri*, he could not do so to the prejudice of his heirs of line, whom it calls to the succession in the last place; Stair, b. 3. tit. 4. § 29.; Bankton, b. 3. tit. 4. § 48.; Stair, 25th July 1672, Gray; Kaims, 13th July 1722, Kennedy. But if the Colonel could not *in lecto* revoke this settlement to the pursuer's prejudice, still less could he make another, by which she was wholly excluded.

2^{dly}, Supposing the deed 1771 effectually revoked, even as to the pursuer's interest under it, she is entitled to set aside the deed 1793, in so far as it imports a new conveyance to the defender. Colonel Crawford, in that settlement, declares the deed 1771 to be "void and null, in so far as it is conceived in favour of the persons to whom it is granted;" so that the right, at least of the persons not *alioqui successuri*, who were called under it, was thus just as effectually annihilated as if the deed had been cancelled or destroyed; in so much that, were Mr Coutts voluntarily to repudiate the succession, it would *eo ipso* devolve on the pursuer, as the Colonel's heir at law. The moment, therefore, he signed the deed 1793, her right in that character revived; and, as it is the new *institutio baredis* contained in this deed which alone excludes her, she is to this extent entitled to reduce it as a deed on deathbed to her prejudice;

Falc.

* Not yet collected.

Falc. 10th June 1748, Cuninghame; Forbes, 23d January 1708, Livingtoun; House of Lords, 30th March 1772, Willocks against Auchterlony; 29th July 1779, Finlay; *ff. lib. 28. tit. 3. l. 2. de injust. rupt. &c.*

Replied: 1st, The destination of the entail 1771, to heirs and assignees, was defeasible by the last *nominatim* substitute, who, if the estate had devolved on him, would have held it in fee-simple; February 27. 1760, Earl of March. The pursuer's right under that destination is, therefore, too remote and contingent to entitle her to object to its total revocation. Besides, if she claim in virtue of the entail 1771, she gives up her character of heir at law, and puts herself in the situation of a disponent under that deed, and must consequently be bound by its whole conditions, one of which is, that the granter should be at liberty to revoke or alter *etiam in articulo mortis*. The pursuer, therefore, cannot found upon any right under that settlement, and at the same time challenge the deed 1793, executed in virtue of the powers expressly reserved by it; Dirlton and Stuart *voce* Deathbed; Fount. Forbes, 8th February 1706, Bertram.

2dly, The revocation contained in the deed 1793, and the new institution in favour of the defender, are *partes ejusdem negotii*, and must stand or fall together. The pursuer will not be allowed to split the deed, so as to make it good as a revocation of the entail 1771, and bad as a new settlement, for this would be to approbate and reprobate the same deed.

Besides, the entail 1771 is not revoked absolutely and unconditionally, but "to the effect only of making the disposition 1793 effectual in favour of the defender;" so that if this last settlement were set aside, the former would still remain in force.

Duplied: The doctrine of approbate and reprobate, applies only where every part of the deed is consistent with law. But an ancestor on deathbed, although he may benefit his heir, cannot injure him. Colonel Crawford consequently was entitled to revoke his former settlement *in lecto*; but in naming a new heir, he acted contrary to the public law. The pursuer, therefore, approbates every part of the deed which the Colonel had a right to execute. The remainder must be held *pro non scripto*, agreeably to the rule, *utile per inutile non vitiatur*. Were a minor, by a deed *mortis causa*, to give his moveable property to his heir, while by the same deed he conveyed his heritage to a stranger, it is thought the heir might take the personal estate under the settlement, and at the same time set it aside as to the heritage.

The Lord Ordinary took the cause to report.

The Court were unanimously of opinion, that the plea set up by the pursuer, on her being called to the succession by the destination in the entail 1771, to heirs and assignees, was ill-founded.

Some of the Judges, however, thought that both deeds should be set aside on the other grounds pleaded by the pursuer. From the terms (it was observed) in which the clause revoking the entail

tail 1771 is conceived, there is no reason to suppose it to have been Colonel Crawford's intention to give his estate to the disponees under that deed, in preference to his heir at law, in the event of its being found that he wanted power to execute the deed in favour of Mr Coutts. Further the disponees under the former settlement might have been prevented by some legal disability from taking the succession, or might have renounced it in favour of the heir at law, so that in any view the disposition 1793 is a deed to the pursuer's prejudice. Besides, Mr Coutt's not being called to the succession under the deed 1771, it is *jus tertii* to him to found on it; and without doing so, the deed 1793 is clearly inept, considered as a new conveyance, although effectual to the heir at law as a revocation of the former settlement.

A considerable majority were of a different opinion. The law of death-bed, (it was observed), does not create any disability in the disponent, it merely gives a privilege personal to the heir at law to challenge the conveyance. But the pursuer being previously excluded by the entail 1771, executed *in liege poustie*, she has no interest to reduce the deathbed settlement. The revocation of the deed 1771 is a qualified one, executed for the sole purpose of making room for the disponee under the deed 1793; and therefore, were that deed to be ineffectual, the disponees under the former settlement would be preferable to the heir at law. And even although the revocation had been simple and absolute, it would not have availed the pursuer, as the presumption of law would still have been, that it was executed from the testator's favour to the new disponee alone, and not to put the heir, in any respect, in a better situation than that in which he stood while the former deed remained unrevoked.

It was also said, that the judgment in the case of Cuninghame against Whitefoords, would probably have been altered in the House of Lords, had not a compromise taken place between the parties, in consequence of which, both consented that it should be affirmed.

The Lords (12th June 1795) assailed the defenders; and, on advising a reclaiming petition with answers, they "adhered."

Lord Ordinary, Stonefield. Aft. Lord Advocate Dundas. Rolland, R. Craigie,
Alt. Solicitor-General Blair, D. F. Erskine, W. Robertson, Tait. Clerk, Sinclair.

R. D.

N° CLXXXVI.

November 24. 1795.

Mrs. J E A N G I B S O N,

A G A I N S T

C H R I S T I A N K E R R R E I D.

TERCE.—TAILZIE.—*The terce may be excluded by an exprefs clause in an entail, even although it should not contain irritant or resolute clauses.*

BY the entail of the estate of Hofelaw, it is declared, that it shall not be lawful for the heirs of entail “to sell, annalzie, or dispone, dilapidate, or put away the said lands and estate, or any part thereof, to whatever person or persons for whatever causes, onerous or gratuitous, nor to grant tacks thereof, or any part of the samen, for any longer space than the lifetime of the granter; nor shall it be lawful for them to contract or take on debts thereupon, nor to grant wadsets thereof, or annualrents, or annuities forth of the samen, nor to do any other act and deed whatsoever, directly or indirectly, whereby the samen, or any part thereof, may be adjudged, apprised, or otherwise affected, burdened or evicted, except allenary, in so far as is hereby specially after reserved, viz. reserving power and liberty to each of the said heirs of tailzie, in the order of succession aforesaid, to provide an liferent jointure in favour of their wives out of said estate, by way of locality only, not exceeding the sum of 400 merks Scots money of yearly rent, subject to a proportional part of the Parliament taxes, ministers, and schoolmasters fees, stipends, and other incumbent duties; which liferent locality so to be provided to wives, is hereby declared to be in full satisfaction to them of all they can ask or claim of the law in name of terce: Declaring also, that albeit it shall happen any of the heirs of tailzie above specified to fail in providing their wives conform to the above-written reservations to that effect, yet the said wives shall have no manner of right to the terce, or any other legal provision upon or out of the said lands and estate, notwithstanding any law or practice to the contrary.”

The entail contains a general resolute, but no irritant clause.

Robert Kerr succeeded as heir of entail of Hofelaw, and afterwards married Jean Gibson.

They had executed no contract of marriage, and he died suddenly, without making any provision for her.

She afterwards brought an action against Christian Kerr Reid, the succeeding heir of entail, a collateral relation of the deceased, in which she claimed L. 100 *per annum* for her aliment. The defender declared his willingness to give her the 400 merks allowed by the entail.

After hearing parties *viva voce*, the Court ordered memorials, and on advising them, and the pursuer having made an amendment on her libel, concluding for her terce out of the lands, a hearing in presence was ordered on the general question, How far the widow's right to the terce can be excluded by an express clause in an entail?

The pursuer

Pleaded: The widow's right of terce is at least coeval with the feudal system; Balf. p. 683. Reg. Maj. b. 2. c. 16. § 2. 3. 4. 5. It originally extended over those lands only in which the husband was infeft at the constitution of the marriage; Ersk. b. 2. tit. 9. § 45.; these, however, it continued to affect, even after they had passed into the hands of a singular successor; and although it might be limited to less than a third of the rents, it could not be further extended even by positive agreement; Reg. Maj. lib. 2. c. 16. § 6. 7.

In order to make good her right, the widow has only to establish, that she was "repute and halden" married to the deceased; 1503, c. 77.; and that he died infeft in the fee of the lands out of which she claims it; and accordingly, by the brief issued from chancery to the Sheriff, his inquiry is restricted to these two points. She possesses the lands neither as creditor to her husband, as his disponee, nor as his representative; not as creditor, because her right is made effectual without diligence against the heir, and if the full rents of her third are not paid her, she cannot affect the property of the lands to his prejudice, but must bring an action against the possessors for the deficiency; Ersk. b. 2. tit. 9. § 50.; not as disponee, because her right is completed without charter or infeftment, and she is liable in no feudal casualties to the superior which would not have been effectual against her husband; Craig, l. 2. d. 22. § 37.; Stair, b. 2. tit. 6. § 17.; and at her death the subject over which it reaches passes to his heir without a new infeftment; nor does she possess as her husband's representative, because she is not liable for his personal obligations; Ersk. b. 2. tit. 9. § 44. 46. In short, she continues the right of her husband to the extent of one third of the lands; but her title to do so is derived from the act of the law, and is altogether independent of his consent; Craig, b. 2. d. 20. § 24. d. 22. § 25.

From these circumstances, it is evident that the terce cannot be excluded by an entail. At common law, entails were effectual against heirs and substitutes, but not against third parties. Prohibitory clauses had no effect till inhibition was used on them. Even then they were not good against onerous deeds, and gratuitous ones were reducible only on the act 1621, as being *in fraudem* of the substitutes; Stair, b. 2. tit. 3. § 59; Mackenzie, v. 2. p. 487.; Bank.

ank. b. 2. tit. 3. § 139.; Ersk. b. 3. tit. 8. § 23. The onerous right of the widow to her terce could not be reduced on that ground; and irritant and resolute clauses never were supported in opposition to onerous deeds till the case of Stormont in 1662. The propriety of that decision, however, was doubted at the time; Stair, b. 2. tit. 3. § 58. See also Mackenzie's remarkable pleadings, No. 2.; Law Tracts v. Property. Even then they were held to strike only against onerous rights voluntarily created, and not against their remote consequences. They could not be opposed to the common law of the land; for example, to the right of the public, in payment of taxes, or other public burdens; to the forfeiture of the heir, on his being guilty of treason, nor to the right of the superior to his casualties, although arising from a voluntary omission on the part of the vassal; nor, for the same reason, to the right of terce. Indeed, such clauses are inapplicable to this right. A clause prohibiting the heir from marrying, or irritating the contract after it was formed, would be set aside as *contra bonos mores*; and if the marriage be supported, the right to terce can only be defeated by the voluntary act of the claimant; and a resolute clause can only operate where there is room for a declarator of irritancy against the contravener; but this cannot be the case with regard to the terce, which does not affect the estate till the death of the husband.

Accordingly, so much was it understood that the terce could not, at common law, be excluded by an entail, that there is no instance of its being attempted before the act 1685. The exclusion of it by an entail, is not enumerated among the modes by which the right of terce may be defeated; Craig, lib. 2. d. 22. § 27. 35.; Balf. Pract. p. 111. c. 24; and although it was the interest of the public that the revenue of the Crown should be kept entire, the terce was, at common law, held to be due, even out of it; 1466, c. 2. Mackenzie's Observations.

The act 1685, c. 22. ascertained the legality of irritant and resolute clauses, but it did not alter their nature, nor extend the range of their application; Mackenzie's Inst. b. 3. tit. 8.; Treatise on tailzies, vol. 2. p. 489. It applies only to those deeds by which the lands may be "apprised, adjudged, or evicted;" but the widow's claim to her terce can be the source of none of those consequences.

It is true that it has become common, since the date of the act, to insert in entails a clause excluding the terce; but, owing to the frequency of conventional provisions, and the circumstance that entails often allow the heir to give an aliment to his widow equivalent to the terce, the effect of such clauses has never before been tried.

Answered: The right of terce may be modified at the pleasure of the parties; it may be renounced; it may be defeated by a sale, or heritable security; by conventional provisions, or by the dissolution of the marriage within year and day; and as its extent is measured by the husband's seisin, it cannot be due where the seisin expressly excludes it; Erskine, b. 2. tit. 9. § 46. A person

son bestowing an estate may dictate the terms of the donation. He may give a liferent only, or he may give a fee, so limited as to exclude the terce; upon the same principle, that, although it was once disputed how far the husband could renounce the *jus mariti*, it never was doubted, that a third party might exclude it as to a subject bestowed by himself; 4th March 1774, Annand and Colhoun against Chessels; Bank. b. 1. tit. 5. § 84.

Although, therefore, it is sufficient for the maker of an entail simply to declare that no terce shall be paid out of the estate, there can be no difficulty in applying irritant and resolutive clauses to the right of terce. To prohibit a person, in general terms, to contract debt, would be equally absurd with the prohibition to enter into a contract of marriage; but the contracting of debt, to the effect of evicting the estate, may be prohibited; Kames, 18th July 1722, Scot; and so may the contracting of marriage, the irritant clauses striking not against the debt, or the marriage, but against their effects on the estate; and surely it is not more the natural and legal effect of marriage to create a right of terce, than for the contracting of debt to create a right of adjudging. Nor is it any objection to the application of a resolutive clause, that the terce does not take place till after the death of the husband. It is not necessary that the resolutive clause should actually be carried into effect; it is sufficient that it appears in the deed, and might be applied, if necessary. Indeed, the same plea might be urged in favour of any debt, upon which no diligence had been done during the lifetime of the debtor, or which was not made payable till after his death; besides, the right of terce may be considered as attaching conditionally during the subsistence of the marriage, and resembling an adjudication in security of a conditional debt.

The right of the wife is surely weaker than that of an onerous creditor, and accordingly it is excluded by an heritable security. By the case of Stormont, however, 26th February 1662, irritant and resolutive clauses were found effectual, at common law, even against creditors; and it would be strange if an entail could exclude the stronger but not the weaker right. Indeed, whatever was the case in questions with creditors, the validity of such clauses in all questions *intra familiam* was never disputed. Accordingly, it was not unusual to exclude the terce in entails executed prior to the act 1685, as in the entail of the family of Roseberry, executed in 1673; in that of Kinnaird, executed in 1679; and in that of Libberton, in 1682.

Further, the act 1685 is of itself conclusive of the question; for it clearly applies to the case of terce, as it occasions a partial eviction of the subject; and it might as well be said that an heir of entail might create a total liferent, as a terce, out of an estate, the entail of which expressly excludes it.

Accordingly, although perhaps a third of the landed property in Scotland is now entailed, and a clause excluding the terce and courtesy has become a matter of common style in entails, it is admitted that its validity was never before disputed, which can only have proceeded from a conviction of its legality, otherwise

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wife every heir of entail would have given his widow a terce out of the estate, as the only way in which he could exert any power over it after his death; Bankt. b. 2. tit. 6. § 18; Bruce, 26th July 1715, Anderson against Withart. Indeed, were such exclusion ineffectual, this singular consequence would follow, that the widow of an heir of entail would be more secure of obtaining her terce than that of an unlimited fiar.

Observed on the Bench: The character of widow and the right to terce are not inseparable. The latter may be renounced, either expressly or by implication; and, like the *jus mariti*, it may be excluded by the terms of the grant, which are strictly obligatory on the widows and children of the substitutes, without irritant and resolutive clauses. The terce and courtesy are precisely in the same situation. They are merely a distribution of the estate, taking place only in those cases where there is no positive agreement of parties; and both are excluded by the uniform style of entails.

The Lords (9th June) found, "that the pursuer is effectually excluded from her claim of terce by the entail, under which her husband possessed the estate of Hofsclaw."

Upon advising a reclaiming petition, and answers, they unanimously adhered.

Adv. Solicitor-General Blair, R. H. Cay. Alt. M. Refs, Neil Ferguson. H. Clerk.

D. D.

N° CLXXXVII.

December 1. 1795.

RICHARD BAINES,

AGAINST

THOMAS TURNBULL.

PERICULUM.—A factor in Scotland, employed to sell goods belonging to English merchants, was accustomed to lodge the price in a private bankinghouse, on an account in his own name, and to take from them bills drawn on their correspondent in London, payable to himself, which he indorsed, and transmitted to his employers, against whom he charged $2\frac{1}{2}$ per cent. commission. Upon the bankruptcy of the drawers and accepters, he was found liable for such bills as had not been paid by them.

THOMAS TURNBULL was extensively employed by English merchants in circulating their patterns in different parts of Scotland, selling their goods, and receiving the price of them. It was his custom to lodge the money and bills received from the purchasers, (whose solvency, it was admitted, he was not bound to guaranty), with Bertram, Gardner and Company, bankers in Edinburgh, upon an account kept in his own name, and from time to time to receive from them bills on Baillie, Pocock and Company, their correspondents, and, as it has since appeared, their partners in London, payable to himself, which he indorsed, and transmitted to his employers, against whom he charged $2\frac{1}{2}$ per cent. commission. He had acted for Richard Baines, merchant at Preston, on these terms, for several years. When Bertram, Gardner and Company, and Baillie, Pocock and Company, became bankrupt, Baines held two bills, drawn by the former, and accepted by the latter, which had been sent to him by Turnbull in the usual way, but which had not then become due.

After some correspondence on the subject, Baines charged Turnbull for payment of them; upon which he brought a suspension.

The charger founded on the correspondence between him and the suspender, both before and after the bankruptcy of the drawers and accepters, as shewing it to be the understanding of both parties, that the suspender's credit was pledged for payment of the bills. Turnbull, on the other hand, contended, that no such inference could be deduced from it; and further stated, that, of his numerous employers, who held bills in the same situation, Baines was the only person who had made a similar demand against him.

The

The charger mentioned the profit made by Turnbull on his cash-account with Bertram, Gardner and Company, as a strong circumstance against the suspender. The latter, however, denied that he received any interest, or made any profit, upon the money lodged with them. The Court directed the trustee on the estate of the bankrupts, to ascertain, from their books, how the matter stood. He accordingly gave in a report, from which it appeared that the books did not throw much light on the matter; but it seemed to be understood, that interest was allowed in certain circumstances.

The charger further

Pleaded: The suspender was debtor to him for the money received from the purchasers of the goods; and the obligation thence arising could only be discharged by the charger actually receiving payment. If the suspender had not understood himself bound to warrant the remittances, he ought to have asked instructions from the charger as to the manner in which the money was to be remitted, or at least to have taken bills from a public bank. On the contrary, without consulting the charger, he threw the money into his general account with his private banker, whose credit and situation were unknown to the charger, and made a profit by so doing. While the money lay in their hands, it certainly was at the risk of the suspender; and it cannot be said to have been taken out of their possession by a draught on their correspondent, which was afterwards dishonoured.

If the bills had been taken payable to the charger, or if the suspender had prefixed the words "without recourse" to his indorsement, the charger would have been called upon to inquire into the responsibility of the drawers and accepters; and his acquiescing in this mode of remitting the money would have been equivalent to express instructions for that purpose. But, as Turnbull uniformly took the bills payable to himself, and indorsed them simply, the charger, on the one hand, satisfied with the security of the suspender, had no occasion to inquire into the solvency of the debtors in the bills; and the suspender, on the other, shewed his own sense of his obligation to warrant the remittances; *Kilk. voce* Factor, 6th June 1739, Ainslie and factor against Arbuthnot; 5th July 1782, Connel; 15th January 1795, Scot.

Answered: As the suspender got no special instructions from the charger, his duty, like that of any other mandatary, consisted merely in acting with that degree of prudence which it is to be presumed the charger himself would have adhibited had he been present. Provided the purchasers of the goods were in good credit at the time he contracted with them, he was not bound to guaranty the payment of the price; and, for the same reason, in making the remittances, all that was incumbent on him was, to transmit bills of a house of acknowledged credit; and Bertram, Gardner and Company were in that situation. So contrary is it to the ordinary duty of a factor to warrant remittances to his constituent,
that

that an obligation to that effect is not implied even where 5 per cent. commission is allowed; July 1791, Fife against Hog*.

The suspender lodged the money with Bertram, Gardner and Company merely as a matter of conveniency; and, when their bills were granted, the case came to be the same as if he had purchased bills from a neutral banker.

If the suspender would not have been liable had the bills been taken payable to the charger, his taking them payable to himself, and indorsing them, cannot be sufficient to create such an obligation against him. It is only where the indorser receives value from the indorsee, or where the indorsation is made to accommodate the drawer, that the indorser is liable to the indorsee. But here the suspender acted merely as the servant of his employer; and it cannot be presumed that he meant gratuitously to undertake an obligation not otherwise binding on him. The situation of the parties makes the case the same as if the words "without recourse" had been added.

The Lord Ordinary reported the cause.

The Court considered the case to be attended with much difficulty, and were greatly divided in opinion with regard to it. On the one hand, it was

Observed: It makes no difference on the question, whether the suspender made any profit on the account with Bertram, Gardner and Company, or not. While the money was in their hands, it was, in the eye of law, in his own possession, and lay at his risk; but the low rate of commission allowed him excludes the supposition of his being bound to warrant the remittances; all that was incumbent on him was, to transmit bills of a house in good credit. When the bills were granted by Bertram, Gardner and Company, the risk passed to the charger.

On the other hand, it was said: While the money lay in the possession of Bertram, Gardner and Company, it was clearly at the risk of the suspender; and as the draught granted by them on their correspondent was not paid, the money must be considered as still remaining in Turnbull's cash-account. Much weight was also laid by some of the Judges on the understanding of parties, as established by the indorsation of the bills, the correspondence, and whole circumstances of the case.

The Lords, (15th January 1795), by a narrow majority, "sustained" the reasons of suspension. But, upon advising a reclaiming petition, and answers, they (7th July 1795) "found the letters orderly proceeded;" and to this interlocutor, upon considering a petition for the suspender, with answers, they "adhered."

Lord Reporter, *Dunfinnan*.

For the Charger, *Geo. Fergusson*.

Alt. Dean of Faculty *Erskine, Maxwell Morrison*.

Clerk, *Menzies*.

D. D.

* Not collected.

N^o CLXXXVIII.

December 1. 1795.

JAMES LEE,

AGAINST

The EXECUTORS of Robert Watson.

ALIMENT.—HUSBAND AND WIFE.—*When the husband's estate is sequestrated, and he flies the country, leaving his wife behind him, her relations are not entitled, in competition with his creditors, to retain a part of her fortune remaining in their hands, either for her aliment during the lifetime of her husband, or for a suitable provision to her after his death.*

GEORGE LUMSDAIN married a daughter of Robert Watson. No contract took place on the marriage; but, by the family settlements, she was entitled to L. 125 from her father, on her marriage, which was accordingly paid, and to the like sum on his death.

Lumsdain became bankrupt, and he was apprehended upon suspicion of forgery. He, however, escaped from prison, and fled to Holland, leaving his wife behind him. His estate was immediately sequestrated. His wife, after having been for some time maintained by her father, went abroad, and resided with her husband for several years; but, she having become insane, he sent her back to Scotland, where, her father being dead, she was maintained by his executors.

James Lee having purchased, from Lumsdain's creditors, the provision which he was to receive in right of his wife, on her father's death, he brought an action against his executors for payment of it.

Various defences were stated before the Lord Ordinary, which it is unnecessary to mention. They were repelled by his Lordship, and afterwards (20th May 1795) by the Court.

In a petition against this interlocutor, and in an additional petition allowed by the Court, retention was, for the first time, claimed by the executors, in relief of Mrs Lumsdain's past, and in security of her future maintenance, during her husband's life, and for a provision to her after his death. In support of this claim, they

Pleaded: In cases where a marriage-contract has been executed, it has often been found, that the wife, upon the bankruptcy of the husband,

husband, is entitled to retain her fortune till the conditions of the contract are fulfilled; and to rank as a creditor for her provisions, if her fortune has been already received by him. And, for the same reason, although there is no contract, it must be implied from the nature of the thing, that a wife shall have the same security for a reasonable provision out of the fortune which she brings along with her; 27th February 1765, Corrie; Fount. 10th November 1687, Creditors of Ogilvie.

And it is surely not more the duty of a husband to secure his wife in a suitable provision after his death, than to aliment her during the subsistence of the marriage. Her right to both is equally onerous. It is true, that so long as a wife resides in family with her husband, the law presumes that she is properly supported by him, and his obligation is modified according to his circumstances; but, if he should refuse to give her an aliment, and, for the same reason, if he should desert her, or turn her out of doors, she becomes a creditor for her maintenance. Fount. 11th June 1712, Robertson; Dalr. 31st January 1717, Cuming; 1770, Jameson against Houston*.

Answered: Where provisions are stipulated in a marriage-contract in return for the wife's fortune, her right of retention arises from the principle of mutual contracts, and not from any inherent right which she has to be provided for; Ersk. b. 3. t. 3. § 86. But where there is no contract of marriage, she is understood to rely on her husband's personal security, and to take her chance of a legal share of the residue of his funds, after his onerous debts are paid; 20th January 1781, Woollen Manufactory at Haddington.

Upon the same principle, where the husband's powers of administration, and the right of his creditors, are not excluded, the husband's obligation to aliment his wife depends on his circumstances, and ceases altogether on his bankruptcy. His wife cannot rank as a creditor for her aliment after his sequestration; and as little can she, or those possessed of her fortune, plead retention on that account; Stair, b. 1. tit. 4. § 10.; Bank. b. 1. tit. 5. § 20.; Dict. vol. 2. p. 76. Durie, 8th March 1639, Lord Kilkadron; Fount. 26th November 1697, and 12th January 1698, Gordon; Fount. 25th November 1709, Turnbull; 8th March 1794, Rob.

The Lords adhered to the former interlocutor, repelling the defences.

Lord Ordinary, *Abercromby*.
Alt. Solicitor-General Blair, *Jo. Clerk*.

A&C. *Connell*.
Clerk, *Home*.

D. D.

* Not yet collected.

N^o CLXXXIX.

December 9. 1795.

The CREDITORS of William Robertson,

A G A I N S T

The DISPONEES of Janet Maſon.

TESTAMENT, FOREIGN. — *Heritable property in Scotland cannot be conveyed by a testament executed in England and in the English form.*

FIAR. — *A disposition of heritable property, granted by a father to his daughter and her husband, "their heirs, executors and assignees whatsoever," and proceeding upon the narrative of love and favour to his daughter, vests the fee in her.*

ALEXANDER ROBERTSON, of London, vintner, was married to Janet Maſon, daughter of William Maſon, nurseryman at Dalry near Edinburgh. It does not appear that any contract was entered into, or any fortune given with her, on the marriage.

In 1772, William Maſon executed a diſpoſition, in which, upon a narrative "of the love, and favour, and affection, which he had and bore to Janet Maſon *alias* Robertson, his eldeſt lawful daughter, ſpouſe to Alexander Robertson, of the pariſh of Botolph, and county of Middleſex, vintner, and for divers other good cauſes and conſiderations him thereunto moving," he conveyed the fix acres and a half of land belonging to him at Dalry, with the houſes built thereon, "to and in favour of the ſaid Janet Maſon *alias* Robertson, and Alexander Robertson, her huſband, their heirs, executors and assignees whatſoever, heritably and irredeemably."

A ſimilar deſcription of the diſponees was given in the procura-tory of reſignation, and in all the other clauſes of the diſpoſition, except in that for the delivery of the ſymbols of infeſtment, in which the huſband was mentioned "for his intereſt."

It contained a clauſe of abſolute warrandice.

Of the ſame date, William Maſon, by a ſeparate deed, bequeathed his whole perſonal property to Alexander Robertson, burdened only with payment of the teſtator's debts, and proviſions to his younger daughters.

William Maſon died ſoon after.

Alexander Robertson took infeſtment on the diſpoſition. In 1779, he executed, in London, and in the English form, a teſtament, in which he "gives, deviſes and bequeaths," his whole property

perty to his wife, particularly his interest in the lands of Dalry, and his other heritable property in Scotland, which was considerable. The deed likewise contained a nomination of executors.

Upon her husband's death, Janet Maſon, under this deed, obtained an adjudication in implement againſt her eldeſt ſon William Robertſon, then abroad.

William Robertſon afterwards brought an action againſt her for ſetting aſide the deed 1779, as a conveyance of heritable property in Scotland, and for having it declared, that, by the deed 1772, the fee of the lands of Dalry was veſted in his father.

Both parties died during the dependence of the action; but the adjudging creditors of the purſuer afterwards inſiſted in it againſt the diſponees of the defender. The grounds for ſetting aſide the deed 1779, and the argument of the parties, were the ſame as in the caſe, 10th June 1795, Henderson againſt Selkirk.

The Lords unanimouſly “found, That the laſt will, executed “after the Engliſh form, cannot effectually convey any heritable “property in Scotland.”

On the effect of the deed 1772 the defenders

Pleaded: Where the fee of a ſubject, conveyed to a huſband and wife, and their heirs, is veſted, is a queſtion of intention, to be gathered from the circumſtances of each caſe. It is a ſettled point, that it is veſted in the wife, where her heirs are chiefly favoured in the ſubſtitutions, or where, as in the preſent caſe, the ſubject is derived from her; Stair, 19th June 1667, Johnſtoun; Stair, Inſt. p. 502; Bank. vol. 2. p. 337; Erſk. b. 3. tit. 8. § 36.

The deed in queſtion proceeds upon the narrative of love and favour to the diſponer's daughter, and it could not, therefore, be meant that the huſband ſhould have it in his power to diſpoſe of it, to the diſappointment both of her and her children. Accordingly, in one claufe of the deed, the ſubject is conveyed to him only for “his intereſt.”

Answered: The general preſumption, that where a ſubject is conveyed conjunctly to huſband and wife, the fee is veſted in the latter as the head of the family, has been long eſta bliſhed in the law of Scotland; Craig, lib. 2. d. 22. § 6.; Stair, b. 2. t. 6. § 10.; and, as there is no preference given to the heirs of the wife, in the preſent caſe, and the ſubject did not proceed from herſelf, but from her father, it does not fall under the uſual exceptions; Forbes, 23d July 1713, Edgar; Stair, b. 2. tit. 6. § 10.; b. 3. tit. 5. § 51.; Fount. 19th January 1697, Laws; Harc. p. 85., 20th December 1682, Ramſay; 11th Auguſt 1781, Blair's Creditors, mentioned in the report, 5th Auguſt 1782, Blairs againſt Bell, &c.; 20th January 1790, Henderson. From the narrative of the deed, there is no reaſon to preſume, that the diſponer meant to infringe the ordinary rules of law in her favour. Indeed, as he had pre-viously given his daughter no provision, the ſubjects may be conſidered as conveyed *nomine dotis*; and accordingly, the deed contains

tains a clause of warrandice, and no power to alter. The giving the fee to the husband was, therefore, a very rational act; and the more likely to be adopted by William Maſon, that from his giving his ſon-in-law the abſolute diſpoſal of his perſonal eſtate, he ſeems to have had complete confidence in him.

The looſe expreſſion, by which the ſubjects are deſcribed as given to the huſband “for his intereſt,” occurring in the clause for delivery of the ſymbols of infeſtment, and not in the diſpoſitive or other important clause of the deed, cannot affect the queſtion.

The Lord Ordinary reported the cauſe.

The Lords unanimoſly “found, That the fee of the lands of “Dalry was veſted in Janet Maſon.”

A reclaiming petition was (14th January 1796) reſuſed without answers.

Lord Reporter, *Eſkgrove*.
penny.

Alt. *Wallace.*

Act. Solicitor-General *Blair, Maconochie, Mox-*
Clerk, Home.

D. D.

Nº CXC.

December 9. 1795.

(TEIND COURT.)

The HERITORS of Portmoak.

AGAINST

Mrs ANNE JEAN DOUGLAS.

TEINDS.—Teinds belonging to a College are not liable for ſtipend till thoſe heritably diſpoſed to the proprietors of the lands are exhausted.

THE teinds of the lands of Kirkneſs, the property of Mrs Anne Jean Douglas, in the pariſh of Portmoak, originally belonged to the Priory of St Serf's Inch in Lochleven, and afterwards to the Priory of St Andrew's. At the Reformation, they were veſted in the Crown, and were beſtowed by James VI. in 1586, on St Leonard's College in St Andrew's, which is deſcribed in the gift as founded by him for promoting the ſtudy of theology. This gift was ratiſied by act of Parliament in 1612.

6 A

Mrs

Mrs Douglas has a lease of her teinds from the College.

The family of Kinrofs are superiors of most of the lands in the parish, of which they are also patrons; and in that capacity they had right, under the acts 1690 and 1693, to the teinds not heritably disposed, but they have since granted heritable rights of them to most of their vassals.

The minister of the parish having got an augmentation to his stipend, a scheme of locality was made up, in which a great part of the burden was laid on the lands of Kirkness, out of which no part of the old stipend had been paid, while those heritors who had heritable rights to their teinds were totally exempted. Mrs Douglas objected, that the teinds of a college can only be burdened *ultima loca*.

The heritors

Pleaded: The provision of a competent stipend to the minister of the parish is a burden inherent on all possessors of teinds, who do not themselves officiate in the cure. Even bishops, the most favoured order of the clergy, had no exemption as to the teinds possessed by them. The Priors of St Serf, must either have officiated themselves or paid stipend, and so must the College of St Andrew's. Indeed, it is a settled point, that teinds held by a college may be so burdened; 12th December 1716, Minister of Old Machar against the College of Aberdeen; 1753, Minister of Marytown against the New College of St Andrew's; 16th May 1792, Minister of Marykirk against the College of Aberdeen*, &c.; and this being the case, the present question must be determined according to the established rules of allocation, by which teinds held in lease by an heritor must be exhausted before those heritably disposed to him; Ersk. b. 2. tit. 10. § 51, 52.

But if it should be thought hard to apply the ordinary rules of law to this case, where the teinds of the parish are derived from different titulars, who have exercised their rights differently, the burden may be divided between them, according to the valued rent of the lands over which their right as titulars extends, on the principle of the decision, 13th July 1774, Fotheringham against Bower, where two parishes had been united.

Answered: So long as the Crown retained possession of other teinds in the parish, it could not be meant that any part of the stipend should be paid out of teinds so solemnly bestowed on a college, originally considered as an ecclesiastical institution, and still less that they should be subjected to a new burden, in consequence of a posterior grant to a layman.

The ordinary rules of allocation, mentioned by Mr Erskine, relate only to the cases where the competition arises between the Crown and a lay-titular, or between a lay-titular and those deriving right from him, and not (as it is indeed virtually admitted by the heritors, from their reference to the case of Fotheringham) to the case where there are two titulars in the parish, both of whom were meant to be equally favoured by the Crown; and still less

* None of these cases are collected.

less to the case where the competition arises between those deriving right from a lay-titular and the lessees of a college.

Further, the ordinary rules of allocation have been introduced, not from an enactment of the Legislature, but from the discretionary powers of the High Commission, and therefore they cannot have place where their application would create injustice to the parties, and be contrary to the enactment of the Legislature. Now, by the act 1693, c. 23. it is declared, that the powers of the Commission of Teinds "shall not be extended to the buying and selling of " teinds, which formerly pertained to bishops, and now belong " to their Majesties, by the abolition of Episcopacy, so long as " the said teinds shall remain in their Majesties hands undisposed " of, nor to teinds belonging to colleges and hospitals, or mortified or destined to pious uses."

The object of this enactment, it is evident, was to preserve entire the revenues of those privileged possessors of teinds; but according to the doctrine of the heritors, its effect would be directly the reverse; for as teinds belonging to these bodies cannot be heritably disposed, the possessors of them would be in a worse situation than ordinary titulars, who, upon a sale of their teinds, get a price, low indeed, but which is not subject to any after burden; whereas, in every parish where the teinds were of the description excepted in the act, the other heritors would find it their interest to purchase their teinds, by which means the whole burden of stipend would fall upon the former, and seminaries of learning, and hospitals for the sick, be deprived of their revenues without any return. But the decisions of the Court, following out the spirit of the statute, have established, that bishops teinds are not liable for stipend, till those heritably disposed by a lay-titular are exhausted; 13th July 1715, Minister of Arngosk against the Heritors *; 7th March 1770, Officers of State against Campbell of Loch-nell †; 3d June 1795, Skene against the Officers of State; and that even bishops teinds are liable before those belonging to a college; 23d June 1756, Straiton ‡.

The Lord Ordinary found, "*1mo*, That the respondent Mrs Douglas could not, in right of the College of St Andrew's, plead " an exemption from the locality, if there were not other teinds " in the parish upon which the stipend could be localled; but " found, *2do*, As there are in this case lay-titulars of teinds, upon " whom the stipend can be localled, the teinds belonging to the " College of St Andrew's, in whose right the respondent pleads, " are by the law entitled to an exemption; and accordingly, by " a late decision, in the case of one of the Colleges of St Andrew's " against Straiton of Lawriston, the teinds belonging to the Col- " lege were found entitled to an exemption, in competition even " with a tack of bishops teinds from the Crown;" and therefore adhered to a former interlocutor sustaining the objection.

Upon advising a reclaiming petition, with answers, it was

Observed

* Not collected.

† Not yet collected.

‡ Not collected on this point.

Observed on the Bench: It is implied in the nature of a grant of teinds for a pious use, that they cannot be attached till those derived from a lay-titular are exhausted.

The Lords unanimously "adhered."

A reclaiming petition was presented for the heritors, in which they quoted the cases, 6th July 1709, Minister of Denino against the Heritors *, and 9th July 1718, Minister of Craig against the Parishioners *, as establishing the opposite doctrine, and craved time to search the records, and lodge an additional petition; but it was unanimously refused, without answers.

Lord Ordinary, *Monboddo*. For the Heritors, *W. Robertson, Williamson*.
Alt. *Maconochie, D. Douglas*.

D. D.

N^o CXCI.

December 12. 1795.

WILLIAM LAW,

AGAINST

DANIEL DEWAR and WILLIAM SPROTT.

PRISONER.—*A person found entitled to the benefit of a cessio bonorum, who was imprisoned by the sentence of a judge till payment of a fine to a private party.*

DANIEL DEWAR, with concurrence of William Sprott, Procurator-fiscal of the city of Edinburgh, presented a complaint to the Magistrates against William Law, for an assault. The Magistrates fined Law L. 5 to the private complainer, and L. 2 to the Procurator-fiscal, and ordered him to be imprisoned till payment.

Law afterwards brought a process of *cessio bonorum*, which was opposed by Dewar and Sprott, his only creditors, who

Pleaded: Strictly speaking, a *cessio bonorum* is competent only where the bankruptcy has been occasioned by innocent misfortune; l. 1. § 3. ff. de pœnis; l. 35. ff. de injur. et fam. lib. l. 37. ff. de minor. Voet ad pandect. lib. 42. tit. 3. § 5; Acts Sed. 1st December

* Not collected.

ber 1685; Bank. b. 4. tit. 40. § 3.; Ersk. b. 4. tit. 3. § 27.; Kames, 19th November 1751, Malloch; 9th August 1781, Stewart; 12th July 1785, Macgubbin. And although, in some late cases, the benefit has been extended to persons imprisoned, *civiliter*, for damages arising *ex delicto*, it has, in no case, been given, where the pursuer has been imprisoned by the sentence of a judge, which must be literally carried into execution, unless it be altered by a superior court.

Answered: Imprisonment awarded, till payment of a sum of money, whether to a private party or public prosecutor, takes place, not *in modum pœnæ*, but is the consequence of poverty, and therefore the case comes to be the same, as where damages, arising *ex delicto*, are awarded in a civil action, and the defender is imprisoned, in the ordinary course of diligence, in which case the benefit of *cessio* is undoubtedly competent; 18th February 1764, Small; 5th March 1791, Macdowall; 15th January 1794, Douglas.

Upon advising notes of precedents for the parties, the Court came to be of opinion, that there was no room for making any distinction between a fine to a private party and damages awarded to him *civiliter ex delicto*; and that upon the principle of the decision, Douglas against her Creditors, there was so far no ground for refusing the *cessio*; but they seemed disposed to refuse it, or, at least, to order further argument, on account of the fine to the Procurator-fiscal, upon which the pursuer's agent paid the fine at the bar.

The Lords unaimously decerned in the *cessio*, and dispensed with the habit.

A&. Inglis.

Alt. W. Baird.

Clerk, Colquhoun,

D. D.

N^o CXCI.

December 16. 1795.

JAMES MANSON, Treasurer of the Guildry, and JAMES MILLER, Procurator-fiscal of the Dean-of-Guild Court of Perth,

A G A I N S T

JAMES MACDONALD.

BURGH ROYAL.—*The daughter of a soldier, although married to a person not a member of the Guildry, may retail groceries within burgh.*

JAMES MACDONALD, a journeyman wright, married the daughter of a soldier, who, after her marriage, set up a small shop in Perth, in which she retailed bread, barley, and small groceries.

The Guildry brought a complaint before the Dean-of-Guild and his counsel against Macdonald, stating, that the trade was carried on by his wife, for his behoof, and concluding, that he should either enter with the Guildry, or pay the annual composition exacted from unfree traders.

The Dean-of-Guild found “ that the defender’s being married
“ to a discharged soldier’s daughter, does not entitle him to the
“ privilege of trading within burgh, and therefore fined and amer-
“ ciated him in the sum of 30 s. Sterling, to be paid to the Guild
“ Treasurer for behoof of the guildry.”

Macdonald brought this judgment under review by advocacy, and

Pleaded: The statute 3d Geo. III. c. 8. enabling the children of soldiers to trade within burgh, does not deprive their daughters of that privilege upon marriage. Perhaps they cannot communicate it to their husbands, so as to entitle them to carry on trade in their own name, but it does not follow that they may not themselves exercise any business for which they are qualified.

Answered: The defender is attempting to shelter himself under his wife’s privilege. She cannot carry on trade but for his behoof; her whole moveables belong to him *jure mariti*, and by her conducting the business, with his knowledge, he is liable for every obligation she comes under respecting it. If the defender’s plea were supported, it would afford a pretence to persons married to the widows or daughters of soldiers to carry on almost every trade in name of their wives, there being few which a female
may

may not superintend, especially as the statute, although it gives the privilege of exercising only those trades which the persons favoured by it "are apt and able for," does not require that, before setting up, they should undergo any trial as to their knowledge in the branch which they intend to follow. Defences, similar to the present, have accordingly been uniformly repelled; 29th January 1778, Taylors in Glasgow against Mackechnie *; 24th February 1790, Corporation of Shoemakers in Perth.

The Lord Ordinary 'affoizied the defender from the action, "and found the pursuers liable to the defender in the expence of "extract."

On advising a reclaiming petition and answers, it was

Observed on the Bench: In cases of this sort, a distinction is to be made between occupations exercised for the most part by men, and those which are frequently carried on by females. When the daughter of a soldier engages in the former, it will, in general, be presumed, that she is attempting collusively to communicate to her husband a privilege personal to herself; but in the latter, there is no room for the presumption. In this case, therefore, the interlocutor of the Lord Ordinary is clearly right. It is to be regretted, however, that the statute does not specify precisely the trades which the widows and daughters of soldiers may exercise after marriage, as it may often be difficult to draw the line.

The Court unanimously "adhered, and founded the pursuers "liable in the expence of the answers."

Lord Ordinary, *Justice-Clerk.*
Clerk, *Home.*

A&C. R. Craigie.

Alt. L. Amy.

R. D.

N^o CXCIH.

* Not collected.

N° CXCIIL.

December 16. 1795.

(TEIND COURT.)

Earl of CASSILLIS,

AGAINST

JAMES FINLAY, Common Agent for carrying on the locality of the Stipend of the Parish of Dalrymple.

TEINDS.—Where part of the lands in a parish are sublet, the rent paid by the principal lessee, and not that which he receives from the subtenant, is adopted as the rule for ascertaining the burden to be imposed on them in a process of augmentation and locality.

THE lands of Gleneard and Merkland, belonging to the Earl of Cassillis, were let, about forty years ago, for L. 25 : 3 : 6 Sterling yearly, on a lease for three nineteen years, for which no grassum was paid. They have since been sublet for L. 80 a-year.

The minister of the parish of Dalrymple, where these lands lie, having brought a process of augmentation and locality, he gave in a rental of the parish, in which he rated them at the rent paid by the subtenant. To this the Earl of Cassillis

Objected : In valuations of teinds, the rent *bona fide* received by the landlord himself, is adopted as the rule for fixing the value of the lands; Dict. vol. ii. v. Teinds, p. 440. 2d December 1730, Baillie; Kilk. p. 551. 6th February 1745, Sir John Maxwell; and the same must hold in processes of augmentation and locality, otherwise this preposterous consequence might follow, that, for a long series of years, the whole rent drawn by the landlord might be payable as stipend to the minister.

Answered : It was intended by the act 1633, c. 17. that the tithe should be one-fifth of the true rent of the lands; Ersk. b. 2. t. 10. § 32. and that surely is to be ascertained, not by the terms of a lease granted 40 years ago, but by the rent which they actually yield at the time; nor can it make any difference whether the whole of it is paid to the landlord, or partly to him, and partly to another.

The objection was first stated in the locality, and was repelled by the Lord Ordinary.

But

But on advising a reclaiming petition with answers, it was

Observed on the Bench: It would be hard that an heritor should pay stipend according to a higher rent than he himself receives. This question falls to be determined pretty much on the same principles as if it had occurred in a valuation of teinds, where the rent actually received by the landlord would have been adopted as the rule.

The Lords unanimously "found, that the rent paid to the landlord must be the rule for ascertaining the rent of his lands, and therefore sustained the objection as to the rent of Glenear and Merkland."

Lord Ordinary, Asherille.

Ag. Cathcart.

Alt. M. Roß.

R. D.

N^o EXCIV.

January 15. 1796.

The CORPORATION of BAKERS at Haddington,

AG A I N S T

DAVID BEGBIE.

BURGH ROYAL.—24th Geo. III. ses. 2. c. 6.—*A trade carried on in name, and, as it was said, for behoof of the son of a discharged soldier, who was only twelve years of age, found to be an evasion of the exclusive privileges of the Corporation.*

JAMES LEE, son of a discharged foldier, lived with and was maintained by his uncle, David Begbie, shopkeeper at Haddington, who, when Lee was only twelve years of age, set him up as a baker in that burgh.

The Corporation of Bakers complained of this to the Tradesbailie, who called before him Lee, Begbie, and a journeyman employed by them. From their declarations it appeared, that the whole expence of the business was defrayed by the uncle; that the bread was baked by the journeyman, assisted by the boy's aunt, and sold in the uncle's shop; and that the boy himself, who was at school, took no other charge of the business than occasionally selling the bread at his leisure hours: The uncle farther

6 C

declared,

declared, that, though no bargain had been made on the subject, the profits were to be applied to the boy's use.

The Bailie prohibited them from carrying on the trade, and afterwards imprisoned Begbie till payment of a fine imposed on account of his disregarding the prohibition.

Begbie presented a bill of suspension and liberation, which was passed.

"The Lord Ordinary found, That the said James Lee had no title to assume the profession of a baker in the burgh of Haddington, being a boy between twelve and thirteen years of age."

In a reclaiming petition, it was

Pleaded: The statutes exempting discharged foldiers, and their children, from the exclusive privileges of corporations, contain no limitation as to the age of the person entitled to their benefit; 12th Cha. II. c. 16.; 12th Ann, c. 13.; 24th Geo. III. fef. 2. c. 6.; and from their nature they ought to receive a liberal interpretation. A wounded foldier might carry on trade by servants; and upon the same principle a foldier's son may do so with the assistance of his relations, provided the trade be conducted for his behoof.

The Court were of opinion, That as Lee was not of an age to carry on trade himself, his name must be presumed to be used by the suspender as a cover for evading the privileges of the Corporation.

The Lords refused the petition without answers.

Lord Ordinary, *Swinton*.

For the petitioners, *Cullen*.

Clerk, *Gordon*.

D. D.

N° CXCV.

N° CXCV.

January 15. 1796.

JOHN DUNLOP, Trustee on the Sequestrated Estate of James Dunlop,

AGAINST

The DUNBARTON GLASSWORK COMPANY, and their CREDITORS.

SOCIETY. — BANKRUPT. — COMPENSATION. — RETENTION. — *The creditors of a solvent Company can rank on the sequestrated estate of one of the partners, who happens to be debtor to the Company, only to the extent of the balance due by him to the Company, and not for the amount of the debts due to themselves.*

THE affairs of James Dunlop having gone into disorder, his estate was sequestrated in 1793.

Mr Dunlop was at this time a partner of the Dunbarton Glasswork Company; but it was provided by the contract of copartnership, that, if any of the partners became bankrupt, they should be obliged to withdraw; and that their interest in the concern should resolve into a claim for their share of the stock at the last balance of the books preceding their bankruptcy.

Mr Dunlop owed the Company a much larger sum than his share of the stock; over which last, it was admitted the Company had a right of retention, but they had only a personal claim against him for the balance.

The capital of the Company having been inadequate to carry on their business, they had borrowed money to a large extent, chiefly upon bonds, in which all the partners were bound jointly and severally.

At Mr Dunlop's bankruptcy, the funds of the Company were more than sufficient to pay all their debts. Most of their creditors, however, in place of demanding their money, accepted corroborative securities: But at the same time they claimed payment from James Dunlop's sequestrated estate; a step which they seem to have taken by desire of the Company, who probably had it in view to compensate *pro tanto* the claim for reimbursement of the dividends drawn by these creditors, which would, in this way, have arisen to James Dunlop's private estate against the Company, with the balance which he owed them; by which means they would have drawn full payment of their debt, in place of ranking for it *pari passu* with the other creditors.

The

The trustee on James Dunlop's estate gave in objections to the claim of the Company creditors in the usual form, and at the same time brought an action both against them and the Company, concluding, that the latter should be ordained to pay the debts due to the former, or, if they should decline to accept payment, that it should be found they were not entitled to claim on the sequestrated estate: And

Pleaded: Although in the case of a bankrupt Company their creditors are entitled to rank on the estates of individual partners, 4th July 1776, Creditors of Carlisle and Company against Creditors of Dunlop*, they can have no interest or title to do so where they can instantly get payment from the Company, their proper debtor. This, therefore, in reality, is a question not with the creditors, but with the Company, to whom the former are attempting to create an undue preference.

But if they shall, nevertheless, be allowed to rank, it should at all events be found, that their doing so cannot give the Company any advantage as creditors of James Dunlop, which they would not have possessed if they had themselves paid the Company debts. In every case of a sequestration, the rights of the creditors must be taken as they stood when it was awarded, at which period the estate of the bankrupt becomes a fund of division among the creditors at large, *pro rata* of their debts, subject only to such preferences as then exist; but when Mr Dunlop's estate was sequestrated, the Company were merely personal creditors, without any preference for the balance remaining due to them. As therefore, by sustaining the claims of the Company creditors, a part of the sequestrated estate, which the Company would not otherwise have got, would come indirectly into their hands, it must *ante omnia* be refunded to the trustee, in the same manner as if by any accident a common creditor had got possession of it after the date of sequestration.

Answered for the Company creditors: It is a fixed principle of law, that every partner of a Company is liable for the Company debts. Although, therefore, the bonds of the claimants had been granted by the Company alone, the creditors would have been entitled to rank upon James Dunlop's estate. The case, however, is the stronger, from Mr Dunlop's being bound jointly and severally with the Company. The solvency of the Company cannot prevent the claimants from seeking payment from any obligant in their bonds. It was indeed for the very purpose of obtaining it more readily, that they took Mr Dunlop and the other individual partners bound *in solidum* for the debts. How far their claim to rank on Mr Dunlop's estate may benefit the Dunbarton Glasgow Company, is a question with which they have no concern. The Court will take care that it shall not give them any improper advantage.

The

* Dictionary, vol. iv. p. 292.

The Lord Ordinary took the cause to report.

Observed on the Bench: This is plainly an attempt on the part of the claimants to give an indirect preference to the Glaswork Company, to which they have no right. The Company being solvent, ought to pay their own debts; and if these should be paid in part out of the sequestrated estate, the Company would not be allowed, in ranking for the balance due to them by Mr Dunlop, to insist on any preference which they would not have possessed had the Company creditors been paid wholly from the Company funds.

The Court "found, That the claim now made by the creditors of the Glasshouse Company must be viewed in the same light as if it had been made by the said Company itself; and therefore found, That said Glasshouse Company are only entitled to rank for the debt due to said Company by James Dunlop, after deduction therefrom of the value of his share of said Company's funds, as at the 31st December 1792; and found expences due."

Lord Ordinary, *Craig*.

For the Trustee, *Lord Advocate Dundas, Solicitor-General Blair, Davidson, Moodie*.

For Creditors of the Company, *Rolland, Hope*.

Clerk, *Menzies*.

R. D.

N^o CXCVI.

January 19. 1796.

CUNINGHAM and SIMPSON.

AGAINST

Sir GEORGE HOME, Baronet, and the COMMISSIONERS for raising Seamen at the Port of Leith.

APPRENTICE.—A master found entitled to reclaim an apprentice not bred to the sea, who had entered a volunteer for the Navy, with the Commissioners appointed by 35th Geo. III. c. 9.; but found not entitled to reclaim another, who had been at sea before the commencement of his apprenticeship.

AN apprentice of Cunningham and Simpson, silver-platers in Edinburgh, who had not formerly been at sea, entered as a volunteer for the Navy, with the Commissioners at Leith, appointed

ed by 35th Geo. III. c. 9. § 5. After he was approved of by Sir George Home, the regulating officer, in terms of § 3. of the statute, but before he was turned over to the service, as directed by § 13. his masters obtained a warrant for his imprisonment from the Magistrates of Edinburgh; but being afterwards liberated upon the application of the Commissioners, his masters brought a suspension against them and Sir George Home; who, in defence,

Pleaded: 1mo, The contract of apprenticeship, like every other obligation of service, falls under the general contract of location, which, unless where the contrary is enacted by special statute, as in leases of land by the law of Scotland, gives no real right in the subject, but merely a personal action for implement, or for damages on failure; Voet. *loc. Cond.* § 15. Stair, b. 1. t. 15. § 4. b. 4. t. 35. § 8. Accordingly, an apprentice remains *sui juris* as much as any other servant. He may contract debt, or commit damage, and be imprisoned for it, and thus disable himself from fulfilling his obligation of service; or if he engage with a second master, his former one cannot reclaim him; nor will it make any difference that possession has followed on the first contract; for a partial implement of a contract of service creates no preference for what remains to be performed; the master, like the creditor in a daily pension, from receiving what has become due one day, has no better right to what is to become due the next, than if the obligation was then only to commence.

If this holds in a competition between two private masters, still less can the suspenders prevail against the Crown. An enrolment stamps a character, which is indelible till a discharge be obtained. Specific implement can be enforced by military law; whereas a private master has no higher powers of coercion than an ordinary *pater familias*.—The utmost he can do is to imprison his apprentice, who, as soon as he is liberated, may be seized by the officers of the Crown; nor, from the personal nature of a contract of service, could Courts of Justice legally grant an interdict against their doing so; and therefore an obligation to serve the public, necessarily puts an end to a private indenture.

Besides, service in war, when the public safety requires it, is a duty incumbent on every member of the State, resulting from the political union, and paramount to all others. This duty, which it is the prerogative of the Crown to enforce, applies to landmen as well as to seamen; the latter are frequently impressed, and no contract of service exempts them from being so. The necessity of impressing landmen is only superseded by voluntary enlistment, and the obligation thereby contracted should therefore be equally supreme.

Accordingly, in various statutes it is evidently implied, that, at common law, apprentices may be impressed, or enter voluntarily into the public service; 2d and 3d Ann, c. 6. § 15.; 4th Ann, c. 19. § 17.; 12th Ann. § 13.; 13th Geo. II. c. 17. § 2.

2do, The statute under which the chargers act declares, § 31. That “no person who shall be enrolled in his Majesty’s service, “by virtue of this act, shall be liable to be taken out of his
“Majesty’s

“ Majesty’s service, by any process whatever, other than by
 “ some criminal process, for some criminal matter, punishable
 “ by the known laws of the land.” The present, however, is
 not a criminal process; and as the act was passed on an emer-
 gency, and laid an embargo on the whole shipping of the country,
 till the number of men required by it was obtained, it was thought
 necessary that no previous civil obligation should be a bar to
 enrolment. Accordingly, in the county-act, which was passed
 about the same time, where, from its giving an alternative of fur-
 nishing a specific number of men, or paying an equivalent in mo-
 ney, there was not the same necessity for dispatch, artied clerks
 and apprentices are expressly excepted, provided they are claimed
 before any part of their bounty is advanced to them, or they are
 turned over to the service; which shews it to have been the under-
 standing of the Legislature, that an express exception was neces-
 sary, where apprentices were not meant to be included, 35th
 Geo. III, c. 29. § 22.

Answered: 1mo, An apprentice is the bondman of his master,
 who is entitled to enforce specific performance. Indeed, this is
 the case in all obligations *ad factum præstandum*; the creditor is
 not obliged to accept of damages, nor even of the penalty stipu-
 lated in lieu of it; Fount. 27th December 1695, Beattie; 11th
 August 1753, Bromfield.

When an apprentice deserts his service, his master may reclaim
 him, as formerly he might have done a collier, or a salter; 1606.
 c. 11. 1661. c. 56.; and in a competition between two masters, the
 rule is, *prior tempore potior jure*, particularly when the first contract
 has been followed by possession; and it can make no difference that
 the second master is the Sovereign, because, in supplying the Army
 and Navy, he is bound by the ordinary rules of common law. He
 is indeed entitled to press persons bred to the sea; and it is a dif-
 ferent question, how far a person liable to be impressed can ac-
 quire an exemption by entering into a posterior obligation of ser-
 vice with a subject. But, except in the case of invasion, or for-
 midable insurrection, when every person becomes liable to military
 service, landmen enter into it only in consequence of their own
 consent, and therefore they must be under no previous obligation
 which prevents them from adhibiting it. The necessity of the
 times might perhaps justify a statute altering the common law, but
 can be no reason for an extension of prerogative, the limits of
 which are fixed, and which give the King as little right to take
 the apprentices as the money of his subjects.

Accordingly, it has hitherto been universally understood, that
 apprentices cannot, against the will of their masters, enter either
 into the Army or Navy; Home, 29th June 1742, Wright; and
 it is easy to see how detrimental the opposite doctrine would be
 to the interests both of masters and apprentices, and consequent-
 ly to the manufactures of the country. The statutes quoted by
 the chargers, all relate to exemptions in favour of persons other-
 wise liable to be impressed, except the 12th Ann, which respects
 the case where the apprentice is not reclaimed by his master.

2do,

2^{do}, If the statute in question had been intended to make so important an alteration on the common law, it would have contained an express enactment for the purpose. But the section appealed to by the chargers, so far from doing so, relates only to persons who are legally enrolled. Its object was to obtain a number of volunteers for the Navy; it could not therefore mean that persons, whose enrolment had been brought about by force or fraud, might be detained in the service; and for the same reason it cannot apply to apprentices, who are not *fui juris*, and who, when opposed by their masters, are incapable of consent. According to the opposite doctrine, even deserters from the Army might be enrolled; and although the 16th section prohibits persons who are not able bodied, and who are above or below a certain age, from being enrolled, even such persons, if once entered, might be kept in the service.

The clause of the county-act is merely declaratory of the common law; it also declares, that deserters, or persons already in the service, shall not be entered under it; yet surely it will not be maintained, that without an express prohibition, such persons might have been enrolled.

The Lord Ordinary on the bills reported the cause on memorials, after which a hearing in presence took place.

When the cause came to be advised, the Judges present were equally divided in their sentiments. The grounds of the opposite opinions are stated in the argument for the parties. They were founded on common law, as well as on the statute*.

From the Lord President having no vote, the bill was, (28th May 1796), refused. But upon advising a reclaiming petition with answers, "the bill was passed" by a casting vote.

Lord Ordinary, *Dreghorn*.

For the Suspenders, *H. Erskine, Esq.*

For the Chargers, *Solicitor-General Blair, Macdonald*.

D. D.

* On both occasions, the Lords were unanimous in refusing a bill of suspension for the same parties, where the person enrolled had been bred to the sea, before becoming their apprentice.

N° CXCVII.

January 29. 1796.

JAMES CHEAPE and JAMES LINDSAY,

AGAINST

DONALD CAMPBELL and his Father's CREDITORS.

ADJUDICATION.—HEIR-APPARENT.—1695, c. 24.—*The creditors of the ancestor are entitled to lead adjudications during the dependance of an action of sale, at the instance of the heir-apparent, where there is no immediate prospect of the estate being sold, and where the interest of the debts is not regularly paid.*

CAPTAIN DONALD CAMPBELL, as heir-apparent to his father, brought a sale of the lands of Barbreck and others, in terms of the act 1695, c. 24.

During its dependance, James Cheape and James Lindsay, heritable creditors of his father, obtained decrees of constitution *cognitionis causa* against him, and in order to accumulate their debts, upon which no interest had been paid since Martinmas 1792, they raised adjudications, which the Lord Ordinary ordered to be intimated in common form.

Captain Campbell and the other creditors

Objected: Actions of sale at the instance of the heir-apparent, are, in reality, brought for behoof of the creditors at large. The decree of sale has the same effect with a decree of adjudication at their instance, and on that account supercedes the necessity of adjudications by particular creditors; Kilker. *voce* Ranking and Sale, 10th June 1747, Maxwell; Act of Sederunt, 11th July 1794. Although the pursuers should succeed in their attempt, it would not improve their security for the principal and interest due to them; and the expence arising from the number of adjudications which would necessarily be led, in order to come *in pari passu* with them, would more than counter-balance any advantage which they might otherwise derive from the measure.

Appetition, containing these objections, was appointed to be answered in the end of February 1795, but hopes being entertained that the lands would soon be sold, the Court delayed advising the cause till 29th January 1796; when the prospect of a sale being still at some distance, it was

Observed on the Bench: In general, an action of sale at the instance of an heir-apparent, renders adjudications by individual creditors unnecessary. But, in the present case, the adjudications ought to be allowed to proceed, that the pursuers may have

the penalties and accumulations as a compensation for the delay in payment of their interest.

Some of the Judges even doubted, if the Court ought to interpose in any case to stop an adjudication.

The Lords unanimously "allowed the adjudication to proceed."

Adv. Hope

Adv. G. Fergusson.

Clerk, Home.

D. D.

N° CXCVIII.

February 2. 1796.

The CREDITORS of Walter Fergusson,

• AGAINST

Mrs CATHARINE SWINTON.

BANKRUPT.—Act 1621.—*An annuity granted by a husband to his wife after insolvency, and by a postnuptial contract of marriage, reduced in so far as it exceeded a reasonable provision.*

IN 1782, Walter Fergusson, writer in Edinburgh, married Mrs Catharine Swinton, a lady of a respectable family, by whom he got a fortune of about L. 1600. Sterling, besides a yearly revenue of L. 84 : 12 : 6, arising from property not falling under the *jus mariti*.

No contract was entered into at the time of the marriage, but by a postnuptial one in 1789, Walter Fergusson, after he had become insolvent, settled a jointure of L. 160 upon his wife, together with L. 150 to purchase furniture. On this contract she was infest in certain subjects belonging to him, a few days after its date.

A ranking and sale of Walter Fergusson's heritable property was afterwards brought, in which Mrs Fergusson having produced this contract and infestment as her interest, the other creditors

Objected: The provision to Mrs Fergusson cannot be considered as onerous, because her husband received and spent her fortune before the date of the contract, which he had come under no previous obligation to execute. It therefore falls under the act 1621, as a gratuitous deed, executed by him after insolvency; and there are no grounds for supporting it to the extent of an aliment, as Mrs Fergusson will have, after her husband's death, L. 84, 2s. 6d. yearly, arising from property not falling under the *jus mariti*.

Answered: Settlements made by a husband on a wife, even after insolvency, are reducible only in so far as they are exorbitant;
Dict.

Dist. vol. i. p. 70.; 11th January 1738, Robertson; 19th June 1635, Walker; 9th January 1676, Brown; 17th February 1738, Mackenzie; 26th July 1744, Campbell. But the provision in question, considering Mrs Fergusson's station in life, and the fortune brought by her, is moderate and reasonable.

The Lord Ordinary took the cause to report.

The Court were unanimous in thinking, that the contract should neither be supported, nor set aside *in toto*. Some of the Judges thought that Mrs Fergusson should be allowed 10 *per cent.* yearly of the fortune brought by her. The prevailing opinion, however, was, that, in cases of this sort, the extent of the widow's provision ought not to depend so much upon what her husband received by her, as upon the rank and situation of the parties.

The Lords, "in respect both parties are agreed that Mrs Fergusson has the property of a house in Tiviot Row, and the fee of two sums of L. 700 and L. 282, 9 s. Sterling, due by bonds bearing interest, restrict her provisions, granted by Mr Fergusson out of his estate, to an annuity of L. 80 Sterling, in the event of her surviving her husband; and in so far repel the objections made to said provisions, and to the heritable security granted for the same, in virtue of the postnuptial contract."

Lord Ordinary, *Mohbodo.*

For the Creditors, *Maconochie, Rae.*

Alt. *Henryman, Cathcart, Arch. Campbell junior.*

Clerk, *Colquhoun.*

R. D.

Nº CXCIX.

February 3. 1796.

The Earl of CASSILLIS

AGAINST

The COMMON AGENT for the Creditors of Hugh Ross.

PRESCRIPTION.—SUPERIOR AND VASSAL.—*The effect of a latent transaction, of an old date, relieving the vassal from payment of the feu-duty, found not to be lost by prescription, although the feu-duty appeared in all the investitures, there being no evidence of its ever having been paid.*

THE Earl of Cassillis held the lands of Nether Skeldon and Airds ward of the Crown; and, in 1613, a contract was entered into between him and John Crawford, by which the former disposed

disposed these lands to the latter for 12,000 merks, to be held feu on payment of 52 merks Scots yearly ; but in order to relieve the vassal of the feu-duty, the Earl obliged himself to grant him an investment of annualrent out of other lands to an equal amount, the annualrent and feu-duty to be held as mutually discharging each other, except when the lands should fall in ward to the Crown, during which period, it was declared, that the feu-duty should be paid to the donator, and the annualrent should cease.

In 1614, the Earl granted a feu-charter of the lands, bearing to be in implement of the contract. It declared the feu-duty to be 52 merks Scots, *si petatur tantum* ; but it took no notice of the discharge of it by means of the annualrent, nor was investment of annualrent ever granted.

In all the subsequent titles down to 1747, (which were granted both to heirs and singular successors), the duties payable by the vassal were declared to be the same as in former investitures, without specifying their amount, and still no mention was made of the annualrent.

In 1678, a declarator of nonentry was obtained by the superior.

In 1747, the vassal accepted a precept of *clare constat* from the superior, in which the 52 merks of yearly feu-duty were declared payable, without any reference to former titles.

The father of Hugh Ross of Kerse afterwards purchased these lands, and was succeeded in them by Hugh his son ; neither of them renewed the investiture.

In 1787, when Hugh Ross's affairs were embarrassed, the Earl of Cassillis obtained a decree of reduction and certification against him for neglecting to pay the feu-duty. No feu-duty, however, was paid by him, nor was there any evidence of its having ever been paid from 1613 downwards.

These lands were sold by Hugh Ross's creditors, warranted free of feu-duty. But the Earl of Cassillis, who represents the original disponer, refused to enter the purchaser, unless on payment of the feu-duty from 1747 downwards ; and his allowing a clause to be inserted in the charter, declaring the Earl's right to the feu-duty, in the same general terms as in the precept 1747.

His Lordship accordingly raised a suspension, in which he stated, that it had been the practice of his family, instead of annually exacting payment of their feu-duties, to content themselves with receiving all arrears each time the investiture was renewed ; that the feu-duties of the lands in question would no doubt be paid in the same manner, though, from the books kept by the agent of the family having been destroyed by fire, direct evidence of the fact could not now be obtained ; but he contended, that the titles to the lands, subsequent to the date of the contract, established both the practice of paying feu-duties, and the right to exact them :

Pleaded : The contract 1613, which is very anomalous in its nature, seems to have been immediately departed from. Not only no investment of annualrent was ever granted in consequence of it, but the charter executed the very next year, while it expressly stipulated the feu-duty of 52 merks, took no notice of the annualrent

rent which was to discharge it. The subsequent titles by which the vassal was taken bound to pay the feu-duty exigible by former investitures, cannot therefore apply to the contract 1613, upon which no possession or infeftment followed; and it is altogether improbable that these titles would have been so expressed, unless the superior, on the one hand, had considered himself entitled to exact, and been accustomed to receive the stipulated *reddendo*, and the vassals, on the other hand, been sensible that they had no right of exemption from payment of it. Since, therefore, the lands in question have been possessed for above 180 years, upon an investiture which entitled the suspender's predecessors to demand a feu-duty, and which they no doubt did at each time the investiture was renewed, while, during this long period, the discharge contained in the contract 1613 has continued latent, the right of the suspender is established by the positive, and that of the charger lost by the negative prescription. Indeed, though no feu-duty had been paid, the investitures under which an estate has been held for 40 years, fix unalterably the rights of superior and vassal, even although, by mistake, they should contain a discrepancy from the prior titles; 5th August 1768, Duke of Buccleuch against the Officers of State. Decision in 1770 between the same parties *.

Answered: The contract 1613 was fair and reasonable, John Crawford gave a full price for the lands; and it was therefore intended that he should pay no feu-duty to the Earl of Cassillis; but, though Crown vassals were at its date entitled to grant feus, 1457, c. 71.; 1503, c. 90. and 91.; Ersk. b. 2. tit. 5. § 7. they could not do so to the prejudice of the superior, and it was therefore necessary that the feu-duty should be kept up, in case the lands should at any time fall in ward to the Crown, which was the reason for its being so provided by the contract. The infeftment of annualrent was meant merely in security of the discharge of the feu-duty, to make it a real burden on the lands, and good against singular successors in the superiority.

Such being the object of the contract, it is incumbent on the suspender to establish, that the right of exemption has been passed from by the vassal. In this, however, he has failed; he has produced no evidence of the feu-duty having been paid, and, in fact, none has been paid since the date of the contract. The charter 1614 expressly bears to be granted in implement of the contract, and must therefore apply equally to every part of it; and as the subsequent titles, down to 1747, all refer to the charter 1614, they are therefore just as much qualified by the contract as if it had been narrated in them. The object of the precept of *clare constat* in 1747, was merely to give the right to the heir *tantum et tale*, as it had been enjoyed by his predecessor; and it is admitted no feu-duties have been paid since its date, which both shews the understanding of parties at granting the precept, and strengthens the presumption, that no prior feu-duties had ever been exacted. In these circumstances, there can be no room either for the positive or negative prescription.

The Lord Ordinary, “ in respect that by the original feu-con-
 “ tract in 1613, the yearly annualrent of 52 merks thereby stipu-
 “ lated, and the like sum of feu-duty, are declared to extinguish
 “ each other ; and in respect there is no evidence that one far-
 “ thing of the feu-duty from the date of the contract downwards,
 “ was ever paid ; found, That the non-payment of feu-duty is
 “ equivalent to possession upon the annualrent-right, and there-
 “ fore prescription, positive or negative, does not strike against
 “ the contract, but that it is binding on the parties and their heirs
 “ at this day : and in respect it is averred by the charger, that
 “ the suspender represents John Earl of Caillies, the party to the
 “ contract, and that the suspender has pointed out no other title
 “ upon which he holds the estate than that of heir, found the
 “ letters orderly proceeded.”

Upon advising a reclaiming petition, with answers, the Lords,
 upon the grounds stated by the respondent, unanimously “ adhered.”

Lord Ordinary, *Justice-Clerk*.
 Alt. *A. Campbell junior*.

For the Suspenders, *D. Catcart*.
 Clerk, *Home*.

D. D.

N° CC.

February 4. 1796.

ANDREW MACWHINNIE, Common Agent in the Ranking of
 the Creditors of Alexander Hooks,

AGAINST

ALEXANDER BURTON.

ADJUDICATION.—*A pluris petitio proceeding from culpable negligence
 found to void an adjudication in toto.*

ALEXANDER Hooks became bankrupt in 1782, when his per-
 sonal estate was sequestrated.

In 1783, Alexander Burton and Nathaniel Agnew paid a debt,
 as cautioners for him, amounting to L. 342 : 10 : 11.

By receipt, bearing date 20th April 1784, Burton acknowledged
 his having received L. 82 : 15 : 6 from John Hathorn, factor on
 Hooks' sequestrated estate, as a dividend on this debt ; and, in
 March 1784, Burton also received L. 20 further to account of it,
 from Robert Murray, a debtor of Hooks. In May 1789, Mr
 Agnew granted an assignation of his half of the debt in favour
 of

of Burton, on the narrative that Burton had paid him the amount of it.

Burton, thus in right of the whole debt, in 1790, led an adjudication upon it over lands belonging to Hooks, without deducting the partial payments of L. 82 15 : 6, and L. 20 which he had previously received.

In a ranking and sale of Hooks' heritable property, which was afterwards brought, the common agent contended, that Burton's adjudication should be set aside *in toto*, on account of the *pluris petitio* which it contained, and which he alleged arose in two ways: 1st, From Burton's not deducting the partial payments he had received before its date; and, 2^{dly}, He stated, that Agnew, previous to the date of his assignation in favour of Burton, had compounded his share of the debt with Hathorn, Burton, and certain other persons, whom Hooks had appointed trustees for that very purpose, and that, in fact, part of the L. 82 : 15 : 6 paid to Burton by Hathorn, was received by him as in full of Agnew's composition; so that in justice Mr Burton's adjudication should have been led only for his own half of the debt, deducting the partial payments which he had received on his own account.

Mr Burton, in defence, stated, 1st, That owing to Hathorn and him having had other transactions together, it happened, that although credit had been given him by Hathorn for the dividend of L. 82 : 15 : 6 on 20th April 1784, this circumstance did not come to his knowledge till July 1789, when he immediately wrote to his agent at Edinburgh, to deduct that payment from the sum for which he had directed the adjudication to be led; and that it was owing to the inadvertency of his man of business that this had not been done. That his receipt for this dividend, although dated in April 1784, was not, in fact, signed by him for eight years after, it having been antedated by Hathorn, from a desire that it should not appear from his vouchers, that any dividends belonging to Hooks' creditors had remained so long in his hands: That the L. 20 paid by Murray was received by Agnew, and not by him; and that its not having been deducted in leading the adjudication, arose from an uncertainty whether it would be admitted as a good payment by Hooks' other creditors, it having been made after his bankruptcy: 2^{dly}, Mr Burton denied that Mr Agnew had accepted a composition for his half of the debt; and although pretty strong circumstances were brought forward by the common agent in proof of his allegation, the Court did not seem to consider it as fully established.

These explanations, it was contended by Mr Burton, evinced, that he had never any intention of concealing the partial payments which he had received, and that therefore, agreeably to the present practice of the Court, the adjudication should at least be sustained, as a security for the principal sum truly due, interest and necessary expences accumulated, as at the date of the decree; Kilkerran, No. 17. *voce* Adjudication, 13th January 1759, Creditors of Dunjop; 7th March 1769, Rutherford.

The Lord Ordinary, "in respect the said Alexander Burton has not made it appear, that the *pluris petitio* in his adjudication was

“ was owing to an innocent mistake, therefore, sustained the said
 “ objection as sufficient to reduce his adjudication *in totum*, lea-
 “ ving him to rank as a personal creditor for what may be found
 “ due to him.”

On advising a reclaiming petition for Burton, with answers, &c.
 it was

Observed on the Bench: A general adjudication is no doubt more
 of the nature of a *pignus prætorium* than of a sale; yet as a decree
 of expiry of the legal, although in absence, may convert it into a
 right of property, it must not be laid down as a general rule, that
 no *pluris petitio* shall have the effect of annulling an adjudication.
 In the present instance, the conduct of Mr Burton was slovenly,
 and even culpable.

The Court ‘adhered,’ and found Mr Burton liable in the ex-
 pence of the answers, &c.

Lord Ordinary, *Swinton*.
 Clerk, *Menzies*.

For Common Agent, *D. Cathcart*

Alt. Hay.

R. D.

N^o CCI.

February 10. 1796.

Mrs ANNABELLA WIGHT and others,

AGAINST

WILLIAM INGLIS, and others.

HERITABLE and MOVEABLE.—*Hay produced from seed sown along
 with barley and wheat in spring 1794, and cut down in summer 1795,
 was found, in a competition between the heir and executor, to belong to
 the former.*

IN spring 1794, William Simpson sowed clover and rye-grass along
 with wheat and barley, on about 70 acres of land belonging
 to him. He died in December following, and Mrs Wight and
 others, his executors, afterwards brought an action against Wil-
 liam Inglis, and his other heirs, concluding, that the hay-crop in
 summer 1795, produced from the seeds sown in 1794, should be
 found to belong to them as an artificial fruit.

The

The arguments used by the parties were, in substance, the same with those to be found in the case Dame Sydney Sinclair against Dalrymple*.

The Lord Ordinary reported the cause.

Observed on the Bench: The hay in question is to be considered as a second crop, and as such belongs to the heir. It is true, the first crop would, in this case, be of little, or perhaps no value; but that arose entirely from wheat or barley having been sown along with the grafs-feeds; and as the crops arising from the former were reaped by Mr Simpson, the executors are by that means fully indemnified for the deficiency or loss of the first crop of grafs.

The Lords unanimously assailed the defenders.

Lord Ordinary, *Esgrove.*

A&C. *Cullen.*

Alt. *Davidson.*

Clerk. *Pringle.*

R. D.

N^o CCII.

February 10. 1796.

HEW DARBY,

AGAINST

JAMES LOVE.

TITLE TO PURSUE.—*The trustee for the creditors of a bankrupt is not entitled to bring a charge of fraudulent bankruptcy against him without the concurrence of his Majesty's Advocate.*

HEW DARBY, trustee on the sequestrated estate of James Love, and himself claiming as a creditor, presented a petition and complaint, in which he accused Love of fraudulent bankruptcy, and craved that he might be punished accordingly; 1621. c. 18.; 1696, c. 5.; 33d Geo. III. c. 74. § 27, 28.

The facts charged were alleged to have happened during the dependence of the sequestration.

6 G

This

* Kilkerran *voc* Heir and Executor, p. 229.; Clerk Home, No. 266.; Kames, 7th December 1744.

of forthcoming which transfers the property to the arrester; Stair, b. 3. tit. 1. § 42. An action of forthcoming cannot, however, be brought on an arrestment which proceeds on a depending action, till an extracted decree for a liquidated sum be obtained in it. But Colonel Graham has obtained no such decree. On the contrary, even the general finding of the Court in his favour may be altered by the House of Peers, and cannot therefore prevent the complete diligence of other creditors from having immediate effect. As a posterior arrestment on a debt presently due, is preferable to a prior one proceeding on a debt *in diem*; Ersk. b. 3. tit. 6. § 18. and 21.; Dict. vol. 1. p. 61. 2d January 1728, Watkins; Stair, 29th July 1670, Charters; so, *a fortiori*, ought the arrestments of Mr Ruthven and his heirs to be preferred to that of Colonel Graham.

Before Colonel Graham appeared in the multiple-poining, the Lord Ordinary had preferred Margaret and Anne Bayne to the funds *in medio*; but on the production of his interest, his Lordship found, "That before Margaret and Anne Baynes, and their husbands, can draw in consequence of the preference they have obtained in the multiple-poining by the former interlocutor, they must find caution to make the money forthcoming to Colonel Graham, whenever his claim against Andrew Straiton shall be ultimately ascertained in his favour."

On advising a reclaiming petition for Margaret and Anne Baynes, against this interlocutor, it was

Observed on the Bench: As the extent of Colonel Graham's debt would have been long since settled, had it not been for Straiton's appeal, it is that circumstance alone which prevents him from obtaining a decree of preference in the multiple-poining. But, as the appeal unavoidably stops that action as to him, equity requires that his competitors should not be allowed to proceed in it. If they were, the precedent would be dangerous; as, on many occasions, it would give rise to collusion and undue advantage.

The Lords found, that the funds arrested must remain *in medio* till the discussion of the appeal*.

Lord Ordinary, *Ankerville*. For the Petitioner, *Dickson*. Clerk, *Sinclair*.

R. D.

* The reporter understands this to have been the judgment of the Court; but he has not been able to see the interlocutor in the record.

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N^o CCIV.

February 24. 1796.

Dame MARY MEAD,

AGAINST

ARCHIBALD SWINTON, Common Agent in the Ranking of the Creditors of the late Sir Samuel Hannay.

TERCE.—*Where there are two mansion-houses on an estate, has the widow a right to the second, as an appendage of her terce?*

SIR SAMUEL HANNAY died infest in the lands of Kirkdale, on which there was an old mansion-house, where he and his family resided. A few years before his death, he built, close by it, a more commodious house, where he proposed to have lived, but he died before it was completed.

Lady Hannay claimed the old mansion-house, as an appendage to her terce, on the ground, that where there are two mansion-houses, the widow is entitled to the second; Craig, l. 2. D. 22. § 29.; Ersk. b. 2. t. 9. § 48.; 29th June 1773, Montier.

She was opposed by the common agent in the ranking of Sir Samuel's creditors, who stated, in the *first* place, That in point of law, it seemed extremely doubtful, if in any case the widow had right to the second mansion-house, no mention being made of such right either by Balfour or Stair, nor any decision finding her entitled to it; *2dly*, That at all events there was no room for such a claim here; it being plain, from Sir Samuel having built the new house within a few yards of the old one, that he must have intended either to have taken it down, or to have converted it into offices.

The question first came before the Sheriff of Kirkcudbright, who having found that "Lady Hannay had no claim upon either of the houses," she complained of the judgment by bill of advocacy.

The Lord Ordinary on the bills took the case to report.

The Court went on the specialty stated by the common agent, on which they were clear that Lady Hannay's claim was groundless. Some of the Judges, however, expressed great doubts whether, even independent of the specialty, it had any foundation in law.

The Lords unanimously refused the bill.

Lord Ordinary, Stonefield.
Clerk, Menzies.

A&S. Maitland.

Alt. Arch. Campbell junior.

R. D.

6 H

N^o CCV.

N° CCV.

February 25. 1796.

ALEXANDER GEDDES and ALLAN CLARKE,

AGAINST

JEAN BULL.

PROOF.—BASTARD.—TITLE TO PURSUE.—*If a title, by adjudication upon a trust-bond, be objected to upon the ground of bastardy, the pursuer must prove his legitimacy.*

ALEXANDER GEDDES and Sarah Fry were said to be married, and had an only son, Alexander Geddes *junior*. Before Sarah Fry's death, however, her alleged husband deserted her, and connected himself with Jean Bull, with whom he settled in Wales, called her his wife, and executed settlements in her favour, conveying to her some lands in Scotland, and his whole moveable property.

Alexander Geddes, after his father's death, being advised to challenge these deeds, as granted *adulterii causa*, executed a trust-bond in favour of Allan Clarke; who, after deducing an adjudication on it, brought a reduction of the settlements.

In defence, it was stated by Jean Bull, That Geddes was a natural son, and consequently had no title to pursue.

Mr Geddes averred, That his father and mother had been received as husband and wife by their friends in Scotland; and produced, in evidence of the celebration of their marriage, a notorial extract of its entry from the register of marriages kept by the person who performed the ceremony, an Episcopal clergyman in Haddington, who is since dead.

The Lord Ordinary, "in respect the pursuer alleges, that he is the lawful son and heir of his father, and that the defender contests his legitimacy, finds the pursuer, before further procedure, must instruct his legitimacy."

In a reclaiming petition, the pursuers

Pleaded: Mr Geddes has produced *prima facie* evidence of his legitimacy, which was more than he was bound to do; for as bastardy is not presumed, Stair, b. 3. tit. 3. § 43. 19th February 1669, King's Advocate against Craw; 6th January 1680, Somerville; the defender, before she is entitled to insist in her present defence, must establish it in a regular process of declarator. The *onus probandi*

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bandi lies upon her, nor can she be relieved of it merely by making a vague allegation in this action, that the pursuer is not legitimate.

Observed on the Bench: The evidence of the marriage of the pursuer's parents, hitherto produced, is not complete; and an adjudication upon a trust-bond being obtained, without any evidence of propinquity, the pursuer must support his title by proof.

The Court refused the petition. \

Lord Ordinary, *Dregborn.*

For the Petitioners, *Rolland.*

Clerk, *Sinclair.*

R. D.

N^o CCVI.

February 25. 1796.

The CARRON COMPANY,

AGAINST

ALEXANDER MUIRHEAD.

BILL OF EXCHANGE.—*Has a promissory-note payable by instalments the statutable privileges of bills?*

GEORGE SCHAW and Alexander Muirhead, granted the following promissory-note to the Carron Company:

" Carron, 11th September 1793.

*" We, Alexander Muirhead, tenant in Hilton of Cowie, and
" George Schaw, tenant in Carmuir, jointly and severally, pro-
" mise to pay to Carron Company or their order, at Carron Office,
" the sum of Fifty pounds Sterling, by regular instalments, of
" three pounds and three shillings per month, the value of the
" said Fifty pounds being delivered to us in three horses and carts.*

" (Signed)

*Alexander Muirhead,
George Schaw.*

" L. 50 Sterling."

The two first instalments were paid by Schaw; but the third not being paid when due, the Carron Company protested the note, and gave the obligants a charge of horning.

Muirhead, in a suspension, maintained, That the writing which
was

was the foundation of the charge could not be considered as a bill or promissory-note, and consequently was neither probative, nor could be the foundation of summary diligence.

Pleading : A promissory-note, entitled to the statutable privileges, is a writing short and simple in its form, containing an obligation to pay a sum of money at a precise day, and capable of being indorsed from hand to hand ; Dict. vol. i. p. 95. February 1721, Viscount of Garnock. But the writing in question is complex, both in its form and in the nature of the engagement undertaken by it. The small sum of L. 50 is split into sixteen different instalments. It does not specify the day or month on which the first instalment is payable ; and, supposing it did, after being protested for payment of one instalment, and the protest registered, it could not be indorsed for the rest ; it being a settled point, that no obligation on which a decree of registration has been taken can be conveyed by indorsation.

Besides, if writings like the present were to have the privileges of bills, the use of bonds of annuity, and other permanent securities, possessed of the legal solemnities, would be wholly superseded.

Answered : The involved narrative of the note is no objection to it ; Forbes on Bills of Exchange, p. 50. ; Dict. vol. i. p. 95. 21st February 1738, Trotter ; nor ought it to be rejected, because it is payable by instalments ; Bacon's Abridgment, vol. iii. p. 606. A drawee may accept a bill for a smaller sum than that contained in it, or at a longer day ; Beawes' *Lex Mercatoria rediviva*, p. 460. ; Cuninghame, p. 35. ; Forbes, p. 72. ; Kyd, p. 49, 50. ; which is precisely the same with accepting a bill payable by instalments, as he may afterwards accept it for the remainder, payable at a more distant period. Although the precise days of payment are not specified in the note, there is no difficulty in discovering them ; and a bill or promissory-note need not be conceived in any settled form. Neither would diligence used for payment of the first instalment prevent its negotiability for the others, as each must be considered, *quoad hoc*, as constituting a separate bill capable of separate negotiation. Nor is there any ground to fear, that sustaining this promissory-note would have the effect of superseding bonds of annuity and other permanent securities, as bills, unless payable within three years at most, have no privilege ; Kames, No. 55. January 1725, Lesly.

The Lord Ordinary reported the cause.

One Judge was against supporting the promissory-note. It was also observed, that supporting notes payable by instalments, might, on some occasions, afford room for evading the stamp-laws. But the Court, in general, seemed to think, that the note lay under no legal objection. As there was, however, some difference of opinion on the question of law, while the Bench were unanimous that the sum charged for was a just debt against Muirhead, they
waved

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waved the determination of the general point, by turning the decree into a libel, and thereafter gave decree against him for the sum contained in it, with expences.

Lord Ordinary, *Abercromby*. Aft. *Jo. Clerk*. Alt. *Mat. Ross* Clerk, *Sinclair*.

R. D.

N^o CCVII.

February 26. 1796.

JAMES LINDSAY CARNEGIE,

AGAINST

GEORGE ROBERTSON SCOTT.

MEMBER OF PARLIAMENT.—*It is a competent objection in a Court of Freeholders, that the seisin of a claimant proceeds on an exhausted precept.*

SEISIN.—*An instrument of seisin signed by the notary once on every leaf is good, although he should have omitted to subscribe some of its pages.*

MISS ISABELLA SCOTT was infeft in 1773, upon a Crown-charter, in lands in Forfarshire, which afford a freehold qualification.

It having been discovered, after the death of the notary who took the infeftment, that he had omitted to sign the 2d, 4th, 6th, and 8th pages of the seisin, (which consisted in all of 14), she, in 1789, took infeftment a second time, on the same precept, and a second instrument of seisin was made out. Both seisins were duly recorded.

Mr George Robertson having married Miss Scott, he claimed to be put on the roll of freeholders, as her husband, and produced, as his title, the charter above mentioned and seisin 1789.

Mr Lindsay Carnegie objected, that a former seisin having been taken on the charter, that produced by the claimant was null, as proceeding upon an exhausted precept.

The Court of Freeholders having repelled the objection, Mr Carnegie presented a petition and complaint, along with which he produced an extract of the seisin 1773.

In defence, Mr Robertson Scott

Pleaded: 1st, The seisin 1789 is ex facie legal and regular; and it is an established rule of election law, that freeholders are not

entitled to refuse enrolment upon any objection, which, like the present, requires extrinsic evidence to support it; Wight, p. 222. Falconer, 26th February 1745, Dunbar; 5th February 1760, Campbell, &c. against Muir; 28th July 1761, Stewart; 9th January 1755, Forrester; 17th February 1779, Burn.

But, *2dly*, The seisin 1789 is in fact unexceptionable; for, although two valid seisins in fee cannot be taken on the same precept, yet, where the first is inept, the second will be effectual. Now, the act 1696, c. 15. (which appears from the act of federunt, 17th January 1756, to extend to seisins) directs every page to be signed by the notary; and such accordingly is the invariable practice. The seisin 1773 was therefore null, four of its pages not being signed by him.

Answered: 1st, The objection stated to Mr Scott's enrolment did not require the aid of extrinsic evidence; for the seisin 1773, being part of the claimant's own titles, could not be so considered. Besides, any written evidence by which a nullity in the title is proved, is competent to be judged of by the freeholders; and new evidence may even be received in this Court. See Wight, p. 143.

2dly, The seisin 1773 is in every respect legal and valid. The act 1696 regulated the subscription of securities only. The mode in which notaries must subscribe seisins, was previously settled by 1686, c. 17. which declares it lawful to write seisins by way of book, "each leaf being signed by the notar and witnesses," an enactment which was strictly complied with in the seisin 1773; and that the statute 1686 is altogether independent of, and was not repealed or qualified by the act 1696, is clear from the latter only requiring that the witnesses should subscribe the last page of the deed, whereas the former ordains that the witnesses to a seisin shall sign every page of it; a form which is at this day indispensable.

The act of federunt 1756 is inaccurate, in supposing that the act 1696 regulates the subscription of seisins.

The Court, on the grounds stated for the complainer, "found
" the respondent was not entitled, in virtue of his titles claimed
" upon, to be enrolled in the roll of freeholders for the shire of
" Forfar; and therefore, granted warrant to, and ordained the
" Sheriff-clerk of the said shire to expunge his name from the said
" roll."

For the Complainer, Lord Advocate Dundas, Solicitor-General Blair, Geo. Fergusson,
Arch. Campbell junior. Alt. H. Erskine, Hay, Mat. Ross, Ad. Gillies, Geo. Robertson-Scott.
Clerk, Home.

R. D.

N^o CCVIII.

N^o CCVIII.

March 1. 1796.

Mrs JEAN GIBSON,

AGAINST

CHRISTIAN KERR REID.

HUSBAND AND WIFE.—TAILZIE.—*When an entail fixes the maximum of the provision which an heir can give to his widow, and he dies without making any settlement on her, a greater sum cannot be awarded to her in name of aliment.*

THE nature of the claim brought in this case by Mrs Jean Gibson against Christian Kerr Reid, and the clauses in the entail of the estate of Hoselaw upon which it depended, have been narrated in N^o 186.

The Court, 9th June 1795, found, “ That in this case, the pursuer’s claim of aliment cannot be extended beyond the 400 merks allowed by the entail in question to be settled on wives.”

Upon advising a reclaiming petition with answers, the Lords, 25th November 1795, “ before answer as to the quantum of her aliment, ordered a condescendence of the free rent of the estate, “ after deducting the interest of the debts with which it is affected, and of any other circumstances that may have an influence “ in ascertaining the extent of the aliment.”

Parties differed as to the amount of the free rent of the estate. It appeared to be about L. 180 or L. 190 *per annum*. But along with his condescendence, the defender gave in a petition, in which he contended, That the question must be determined by the clauses of the entail, without regard to the value of the estate; and further,

Pleaded: If the claim of a widow to an aliment out of the estate of her deceased husband, different from the terce and *jus relictæ*, be at all founded in law, it comes under the description of a legal provision, and therefore the entail of Hoselaw contains an irritant, as well as a prohibitory and resolute clause against it; and it can make no difference as to this question, that the entail contains no irritancy against the contracting of ordinary debts.

Besides irritant and resolute clauses were both unnecessary. The right of the widow, at best, is only to a maintenance out of the free funds of her husband: it is postponed not only to onerous but gratuitous creditors, and consequently must be postponed to the

the right of the substitutes in an entail with prohibitory clauses, which constitutes them onerous creditors of the heir in possession.

Answered: The widow is an onerous creditor against her husband's estate, to the extent of a maintenance suited to his rank and circumstances. Her claim may therefore be made effectual out of any subject which is liable to his onerous debts, and it is admitted, that the estate of Hofelaw is so.

Further, although the entail gives the heir a faculty to provide 400 merks to his widow, declares that sum to be in full, and contains an irritancy against her legal provisions, upon the heir's failure to exert the faculty, it contains no prohibition against his granting a larger sum, or irritancy of the excess; and, as the limitations of the entail are not to be extended by implication, the deceased might have settled on the pursuer the sum which she now claims, and it is in the power of the Court to supply the omission. Even though the limitations of the entail were held to apply to this case, the same equitable powers which have enabled the Court, to give an alimentary provision, where the marriage was dissolved within year and day, or a terce out of lands in which the husband was not infeft, would authorise the present claim; 6th March 1778, Thomson against Macculloch; 15th December 1786, Lowther against MacLaine; 27th January 1790, Young against Campbell.

Upon advising the petition and condescendence, with answers, it was

Observed on the Bench: Where a husband, who possesses an estate in fee-simple, neglects to provide his widow, the Court may, by giving an aliment out of his estate, supply the omission; but in the present case, the Court cannot, more than the deceased himself, exceed the sum allowed by the entail.

The Lords unanimously "adhered to the interlocutor of 9th June 1795."

Aft. Solicitor-General Blair. R. H. Cay.
Clerk, Home.

Alt. M. Rossi, Niel Fergusson.

D. D.

N^o CCIX.

March 4. 1796.

WILLIAM GOVAN,

AGAINST

Sir GEORGE DOUGLAS, Baronet, and others.

MEMBER OF PARLIAMENT.—*A meeting of freeholders who had rejected a claim presented to them, found liable in the expence of serving a petition and complaint against their judgment, because they had omitted to mark in their minutes one of their number as objector.*

WILLIAM GOVAN, previously to the Michaelmas meeting of Roxburgh in 1795, lodged a claim for enrolment with the Sheriff-clerk.

Neither he, nor any person for him, attended the meeting.

A majority, “found that the claim and titles did not precisely correspond;” and therefore refused to admit the claimant to the roll.

The minutes did not specify by whom the objection was made or supported.

Mr Govan presented a petition and complaint, which was served against Sir George Douglas the preses, and all the other freeholders present at the meeting, and was followed with answers, &c.

The Court, without entering into the merits of the Judgment of the freeholders, had no doubt that the complainer, in consequence of the explanations and productions since made by him, was now, at least, entitled to be admitted upon the roll; and while it was thought he had been to blame for not attending the meeting, or sending some person for him, they were of opinion, that some individual freeholder, present at it, ought to have been marked as objector, by which means the complainer would have been saved the expence of serving the petition against the rest.

The Lords unanimously “found the freeholders did wrong in refusing to admit the complainer upon the roll of freeholders of said county: Therefore granted warrant to, and ordained the Sheriff-clerk of said county, to add his name to the roll accordingly: Found the petitioner entitled to the expences of serving this petition and complaint, of which allowed an account to be given in, and of the full expence of extract, but no other expence.”

A& J. W. Murray.

Alt. Geo. Fergusson, Boyle.

Clerk, Pringle.

D. D.

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N^o CCX.

N° CCX.

March 8. 1796.

MARY PIRIE and her Attorney,

AGAINST

ANDREW LUNAN.

FORUM COMPETENS.—FOREIGN.—*How far are the Commissaries competent in an action of divorce, where both the pursuer and defender reside in England, they being natives of Scotland, and domiciled there at the time of their marriage?*

IN 1778, Andrew Lunan and Mary Pirie, both natives of Scotland, were married in Aberdeen, where they resided for some years.

Lunan afterwards settled in London, and carried his wife there; but he soon after deserted her, and connected himself with another woman, whom he brought on a visit to Scotland in 1794. After residing some months at Stenhaven among his friends, he returned with her to London.

Mary Pirie, who, after her husband's desertion, continued to reside in London, having brought an action of divorce against him before the Commissaries; they, "in respect that the domicile, both of the pursuer and defender, is situated in London, and that the facts founded on in the libel, as inferring the defender's guilt of adultery, are stated to have happened there, dismissed this action as incompetent."

A bill of advocacy against this judgment having been refused by the Lord Ordinary, the pursuer, in a reclaiming petition,

Pleaded: As both parties are natives of Scotland, the jurisdiction of the Commissaries is competent *ratione originis*; Ersk. p. 30. § 19; Durie, 15th November 1626, Galbraith; 8th December 1726, Lord Blantyre; Kilk. p. 214. July 1747, Anderson; 27th June 1760, Hog; especially as Scotland was also the *locus contractus*, and the country where the parties, at the time of the marriage, intended to remain; a circumstance which materially distinguishes this case from that of Brunstone against Sir Thomas Wallace, 9th February 1789. Indeed, the object of the action being to dissolve the marriage, it can come before no Judges so properly as those of the country where it was contracted.

The Court, 15th December 1795, appointed the petition to be answered; and as the defender had hitherto made no appearance, they at the same time ordered it to be intimated to him personally in London.

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A certificate, by a notary, of its regular intimation to Lunan was accordingly produced; and no answer having been given in, the Court advised the petition *ex parte*; when it was

Observed on the Bench: Even in the case of Sir Thomas Wallace, where the marriage took place in England, the Court were much divided in opinion; and the propriety of the decision which was given in it may be doubted, especially as Sir Thomas, at the period of the action, had no residence in England, more than in Scotland, but was living in France. In this case, there can be no harm in allowing the action to proceed, and decree to be obtained in absence; *valeat quantum valere potest*.

The Court remitted to the Commissaries to proceed in the action.

Lord Ordinary, *Justice-Clerk*.

For the Petitioner, *Williamson*.

Clerk, *Horne*.

R. D.

N° CCXI.

March 9. 1796.

The Reverend JOHN HUNTER, Minister of the parish of Oxnam,

AGAINST

The Duke of ROXBURGH.

TEINDS.—*A minister who is titular of the vicarage-teinds of certain lands in his parish, and of which his predecessors had granted successive leases to the heritor for upwards of a century, is not entitled, on the expiry of the current lease, to claim the tithe of all the articles from which vicarage is usually payable, but must either accept the rent and grassum as its value, or bring evidence of the particular subjects from which vicarage-teinds were drawn before the first lease was granted.*

PART of the stipend of the parish of Oxnam arises from certain vicarage-tithes due out of the lands of Plenderleath and Hyndhopes, belonging to the Duke of Roxburgh. These tithes, since 1686, have been uniformly let, by the incumbent for the time, to his Grace's predecessors, for L. 106 : 13 : 4 Scots of yearly rent, and a grassum of L. 1000 Scots at the commencement of each lease.

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The leases were always made to endure for the lifetime of the granter, and three years longer; and the subject let was described to be, "All and fundry the vicarage-tithes, fruits, emoluments" and duties, of all and haill the said Duke of Roxburgh his lands "and barony of Plenderleath," &c.

Mr Hunter, the present minister, on the expiry of the lease current at his admission, brought an action of declarator against the Duke of Roxburgh, in which he contended, That he was entitled to the *ipfa corpora* of the vicarage-teinds of all the articles raised up on the lands from which vicarage is payable; and, at all events, that he was entitled to the tithe of stirks, lambs, and wool.

In defence, the Duke contended, that the evidence of the pursuer being titular of the vicarage-teinds was incomplete; and that, even although this were established, there was no evidence of their having been ever paid in kind: And further

Pleaded: 1st, The heritor, by forty years disuse of payment, acquires a total immunity from the burden of vicarage-tithes; Mackenzie, b. 2. tit. 10.; Macdowall, b. 2. tit. 8. § 140.; and for the same reason, as the defender has paid only the rent and grassum for a much longer period, nothing further can now be demanded from him; 10th December 1740, Lord Cranston against the Heritors of Hobkirk*.

2dly, At all events, vicarage-teinds being wholly local and consuetudinary; Ersk. b. 2. tit. 10. § 13.; Fount. 20th January 1706, Earl of Galloway; the pursuer must either accept the rent as the *quantum* of the teinds, or prove what were the articles from which they were paid before the leases were first granted, which he has not hitherto done: And should the pursuer be unable to do this, his predecessors are alone to blame, as they ought to have specified in the leases the different articles from which the teinds were payable.

Answered: 1st, Had the defender and his predecessors, without accepting leases of their vicarage-teinds, merely paid a sum of money in lieu of them, there might have been something in his argument. But as they have possessed them as lessees under the minister, their possession must be considered as his, and consequently, that possession being now at an end, the pursuer is entitled to exact the teinds precisely as they were drawn before it began; Ersk. b. 2. tit. 10. § 30.

2dly, By the leases the defender's predecessors got right to 'all' the vicarage-teinds of the lands in question; from which it must be inferred, that the titular has a claim to the tithe of every article mentioned by our writers as subject to vicarage-teinds; Macdowall, b. 2. tit. 8. § 140.; Stair, b. 2. tit. 8. § 6. At all events, he must be entitled to the tithe of lambs, stirks and wool, which are included under the most limited species of them; Ersk. b. 2. tit. 10. § 13.; Dict. vol. ii. p. 438; 24th July 1678, Grant against Mackintosh.

* Not collected.

The Lord Ordinary took the question to report.

Observed on the Bench: The pursuer's right of titularity is fully established; but as vicarage-teinds depend entirely upon custom, he must either take the rent and grassum as their amount, or prove from what subjects they were payable before the leases were first granted. It is a mistake to suppose, that wherever vicarage is due, stirks, lambs and wool fall under it. The writers on our law have expressed themselves somewhat inaccurately on this point; but their meaning is, that vicarage is more ordinarily payable from these than from other articles.

The Lords, 20th November 1795, "found, That the pursuer, as minister of the parish of Oxnam, is titular of the vicarage-teinds in question; but in respect he has not condescended upon, or offered to prove, what vicarage-teinds were in use to be drawn by his predecessors, found, That, in *hoc statu*, his demand falls to be restricted to the sum of L. 106 : 13 : 4 Scots of tack-duty yearly, and L. 1000 Scots of grassum, in use to be paid at the admission of each incumbent."

The Duke of Roxburgh, in a reclaiming petition, stated, That, by inveterate practice, he and his predecessors, on paying the L. 1000 Scots of grassum, were entitled to a lease of the teinds *during the life of the incumbent, and three years longer*; but that by the present judgment, he was made liable for the grassum at the *admission* of each incumbent. His Grace therefore prayed, that the interlocutor might be so far altered, or explained, as to find that he was entitled to a lease on the usual terms.

The Court pronounced the following interlocutor: "Find, That upon payment of the fine or grassum of 1000 Scots, the petitioner and his successors are entitled to a lease of the vicarage-tithes in question during the life of the incumbent at the time, and for three years thereafter; and, with this explanation, adhere to the interlocutor reclaimed against."

Lord Ordinary, *Eskgrove*. Aft. Solicitor-General Blair, Dickson, Ar. Campbell junior.
Alt. Rolland, H. Erskine, R. Craigie. Clerk, Pringle.

R. D.

N^o CCXII.

March 9. 1796.

The Honourable Mrs MARIANNE MACKAY and Colonel WILLIAM FULLERTON,

AGAINST

Sir HEW DALRYMPLE, and others.



HEIR-APPARENT.—SEQUESTRATION.—*Notwithstanding the dependence of an action of reduction and declarator of irritancy brought against a proprietor and his heir-apparent, the latter, upon the death of the former, is entitled to continue the possession till decree is obtained.*

THE Honourable Mrs Marianne Mackay, with consent of her husband, Colonel Fullerton, in 1793, brought a reduction and declarator of irritancy against John Hamilton, (who had been infeft in the estate of Bargany upon a charter of resignation in 1742, and had been in the uninterrupted possession of it ever since), and against Sir Hew Dalrymple, his nearest heir both of law and of provision, in which she narrated an entail of the estate executed by Lord Bargany in 1688; the manner in which the succession under it had devolved on the late Sir Hew Dalrymple, and his renouncing it in favour of his younger brother Mr Hamilton; from which she inferred, that the late Sir Hew by granting, and Mr Hamilton by accepting this renunciation, and thereby altering the course of succession, had incurred an irritancy for themselves and their descendants; that the pursuer, as next substitute to them, was entitled to the estate; and that the titles made up by Mr Hamilton in 1742, and a settlement made by him in 1780, upon which infeftment had followed, were null and void; and concluded, that decree of reduction and declarator should be pronounced accordingly.

The defenders produced Mr Hamilton's charter and infeftment in 1742, which, with the subsequent possession, they founded on as a title to exclude the pursuer by the positive prescription.

The Court, (9th February 1796,) repelled this defence, upon the ground of Mrs Fullerton's minority during a part of the time requisite for prescription*.

Mr Hamilton died 12th February; and the pursuer immediately presented a petition to the Court, praying, that the estate might be sequestrated till the issue of the cause.

In

* *Note.* This point was not finally decided till Winter-session 1796.

In support of this demand she

Pleaded: As Mr Hamilton was in possession before the action was raised, he could not have been turned out of it till decree was pronounced. The dependence of the action, however, made the subject litigious; and as Mr Hamilton's death left the possession vacant, no good reason occurs for preferring either competitor to the rents in the mean time, and therefore the estate should be taken into the hands of the Court till the merits of the cause be determined; Stair, b. 1. tit. 13. § 5.; b. 4. tit. 50. § 27.; 1769, Dickson against the Earl of Hyndford*; 1795, Duff against Earl of Fife*.

A person claiming the privilege of apparenacy must be called to the succession, not merely by the act of the person last in possession, but by the subsisting investitures of the estate; and, in this case, the entail 1688, according to which, as their warrant, the titles made up in 1742 and 1780 must be interpreted, did, in consequence of the irritancy which has been incurred, *ipso facto* exclude the defender from the succession.

Answered: It is admitted, that the late Mr Hamilton was entitled to retain possession till decree should be pronounced against him; and it is a settled point, that an heir-apparent, who, in law, is held to be *eadem persona cum defuncto*, is entitled to continue the possession of his predecessor; Bankt. vol. ii. p. 324. 377.; Ersk. b. 3. tit. 8. § 58.; b. 2. tit. 12. § 55.; *Voet. depositi*, § 14. *et seq.*; Fount. 24th June 1698, Home; 28th November 1761, Duke of Hamilton against Douglas. But it is impossible to figure a more complete state of legal apparenacy than that of the defender, both as being heir at law, and of the last investitures; while, on the other hand, the right of the pursuer consists merely in a title to insist in certain conclusions, the issue of which must at present be uncertain. Were this application, therefore, supported, the most groundless claims might have the effect of inverting possession, and the established privileges of apparenacy be destroyed whenever the right of the predecessor was disputed.

The Lords unanimously 'refused' the petition, upon advising it with answers, &c.

Lord Ordinary, Justice-Clerk. A&C. Solicitor-General Blair, Tait, Hope, et alii.
Alt. Geo. Fergusson, H. Erskine, Thomson, et alii. Clerk, Sinclair.

D. D.

* Not collected.

N° CCXIII.

May 13. 1796.

ALEXANDER NAIRNE, Trustee on the Sequestrated Estate of
Peter and Francis Forrester and Company,

AGAINST

THOMAS CRANSTOUN, Trustee for the Creditors of Alexander
Laidlaw.

BANKRUPT.—COMPENSATION.—RETENTION.—*A and B granted accommodation-bills to each other nearly of the same value. A indorsed the bills accepted by B for value; but B retained in his own hands those granted by A. A and B having afterwards become bankrupt, the indorsees of B's bills ranked for payment of them, both upon his estate as acceptor, and upon A's as drawer; from the former they drew 10 s. in the pound, and from the latter 5 s. In this situation it was found, that B's creditors were entitled likewise to rank on A's estate for the bills granted by him to B, and that compensation or retention could not be pleaded by A's creditors against their doing so.*

ALEXANDER LAIDLAW accepted bills drawn by Peter and Francis Forrester and Company to the amount of L. 831 : 3 : 6; and, on the other hand, they at the same time granted promissory-notes to Laidlaw for L. 833 : 9 : 7. Both sets of bills were payable either five or six months after date.

Peter and Francis Forrester and Company indorsed the bills accepted by Laidlaw, and received their value; but before they were payable the Company became bankrupt.

About the same time Laidlaw also stopped payment, while possessed of the promissory-notes of Forrester and Company.

The holders of Laidlaw's bills drew 10 s. in the pound of their amount from his estate. They also ranked for them upon the estate of Forrester and Company, from which it was supposed they would draw 5 s. more.

Mr Cranstoun, trustee for Laidlaw's creditors, having claimed to be ranked on Forrester and Company's estate for the promissory-notes granted to Laidlaw by them, Mr Nairne, the trustee upon it,

Objected: The granting of the promissory-notes did not create a debt against Forrester and Company, distinct from that due by them in consequence of the accommodation-bills which they received from Laidlaw, and got discounted. These bills were the only value which they received for granting them; and, had Forrester and Company paid them, Laidlaw would have had no claim

claim for the promissory-notes. These promissory-notes, therefore, can be considered in no other light than as a security put into Laidlaw's hands by Forrester and Company, in relief of the obligation which he had undertaken by accepting the accommodation-bills. If, indeed, Laidlaw had paid these bills, and so prevented their ranking on the estate of Forrester and Company, he would have been entitled to rank upon it in virtue of his promissory-notes. But as he has failed to do so, and as the holders of these bills are already ranked on Forrester and Company's estate, and will draw a ratable proportion of it with their other creditors, it is plain, that Forrester and Company's trustee is entitled to plead compensation or retention against the claim made by Laidlaw's creditors; for, to sustain the claim, would be to allow both the creditor and the cautioner of the debtor to rank for the same debt, contrary to the established rule, that no debt can be ranked more than once on the personal estate of a bankrupt; 9th December 1794, Curtis.

Answered: It is a mistake to suppose, that, in consequence of the transaction between Forrester and Company and Laidlaw, the latter stood in the situation of cautioner for the former. Had this been its object, Forrester and Company would not have given Laidlaw promissory-notes as his security in relief. The transaction that took place between them, was, in fact, an exchange of bills, entered into with a view reciprocally to support each other's credit; and at its commencement, it was a fair and equal transaction. The only risk which either party ran, was the possibility of the bills of the one becoming of less value than those of the other, when they should become payable. If both parties had continued solvent till that period, the transaction would have been finished, by each taking back their own bills, and it would have thus ended in the same equality and fairness with which it began. Suppose even that both had become bankrupt, and that both had indorsed the bills received by them, the holders of either set of bills would have been entitled to rank for them, without any regard to the dividends drawn on the other; and still there would have been no unfairness in the transaction; for it was foreseen from the beginning, that the bills of the one might become less valuable than those of the other.

But as in the case which has occurred, Forrester and Company have indorsed for value the bills accepted by Laidlaw, while he has retained their promissory-notes, if the present objection were sustained, the transaction would result in the greatest unfairness and inequality. For Forrester and Company, by indorsing the bills of Laidlaw for value, have benefited their estate to their full amount, of which the holders of these bills have only got back from it 5 s. in the pound; so that even after Laidlaw's creditors shall rank upon Forrester's estate for the promissory-notes, and get other 5 s. it will, in fact, gain 10 s. in the pound; whereas the holders of the bills accepted by Laidlaw having drawn 10 s. in the pound of their amount from his estate, it is obvious, that his creditors will lose at all events a sum equal to 5 s.

in the pound on these bills; and were the present objection sustained, they would lose precisely the 10 s. in the pound which has been paid of them out of his estate.

The Lord Ordinary 'sustained the objection to the claim.'

On advising a reclaiming petition, with answers, some of the Judges thought, that Laidlaw stood in the same situation as if he had got a letter of relief from Forrester and Company, on accepting the bills drawn by them, and that as these bills had already ranked upon their estate, Laidlaw could not also rank for his promissory-notes.

A considerable majority were of an opposite opinion. The two sets of bills, (it was said), created two distinct debts; and as Forrester and Company derived the benefit of those accepted by Laidlaw, it was no bar to his ranking on their estate for their promissory-notes, that the holders of the bills accepted by him had also ranked upon it. In complicated cases of this sort, the object is, as far as possible, to preserve equality between the parties, which would not be done were the judgment of the Lord Ordinary adhered to. On this principle, however, it is equally clear, that Laidlaw's creditors ought to be allowed to draw no more from Forrester and Company's estate than what is sufficient to indemnify them.

It was also observed, that the case of Curtis was ill decided; and, accordingly, the decision has been since reversed by the House of Lords.

The Lords, 24th November 1795, repelled the objection to the petitioner's claim; and on advising a reclaiming petition, with answers, they "adhered."

Lord Ordinary, *Metburn*.
Alt. Mat. Refs, *Tait*.

For the Objector, *Hay, Walker Baird*.
Clerk, *Menzies*.

R. D.

N° CCXIV.

May 1796.

COURT OF SESSION.

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N^o CCXIV.

May 14. 1796.

PATRICK PROCTOR,

AGAINST

Sir DAVID CARNEGIE.

MEMBER OF PARLIAMENT.—*A claimant having produced, before a Court of Freeholders, a disposition from Commissioners, containing an assignation to a precept of seisin in a Crown charter in favour of their constituent, and his claim having been rejected, because he did not produce the commission under which the disposition was granted, it was found, that the objection might be removed by his afterwards producing it in the Court of Session.*

GROUNDS AND WARRANTS—*Where a precept of seisin is assigned in a disposition granted by the Commissioners of the person in whose favour the charter containing the precept is conceived, a seisin taken upon it by the disponee is valid, although the commission under which the disposition was granted should neither be exhibited by his attorney to the Bailie, nor narrated in the instrument of seisin.*

PATRICK PROCTOR claimed to be enrolled as a freeholder in Forfarshire, and produced a charter from the Crown, containing lands affording a freehold qualification, in favour of the Earl of Strathmore; a disposition thereof to himself by Thomas Lyon and James Dundas, the Earl's Commissioners, containing an assignation to the unexecuted precept in the charter, and an instrument of seisin taken in virtue of it in his favour.

But he did not produce the Earl's commission to Messrs Lyon and Dundas; and although it was referred to in his claim, neither its date nor that of its registration were specified. Nor did it appear from his seisin, that it had been produced by his attorney to the Bailie when the infeftment was taken.

To these titles Sir David Carnegie

Objected: A claimant, before his enrolment, must produce to the freeholders "the whole titles and vouchers of his qualification;" 16th Geo. II. Mr Proctor ought therefore to have produced Lord Strathmore's commission to Messrs Lyon and Dundas, as forming an essential part of his titles; because without it, he does not connect them with the charter on which his infeftment proceeds; for it is as essential to their validity, that the Commissioners should be connected with the charter, as that he should connect himself with them

them by the disposition; Fac. Coll. vol. iv. p. 372. 17th February 1767, Sir John Gordon; 10th February 1781, Moodie; 23d February 1790, Nilbet.

2dly, The act 1693, c. 35. declares, That all feifins in favour of a difpensee, different from the person to whom the original precept is granted, shall be null, unless the titles by which the former has right to it are deduced in the instrument. Mr Proctor's feifin is therefore void, from its neither narrating the commission to Messrs Lyon and Dundas, nor stating that it was exhibited by his attorney to the Bailie. Indeed, independently of statute, a Bailie, at common law, cannot give a valid infeftment, unless the attorney shew a complete right to the precept in the person of his constituent; Craig, l. 2. d. 7. § 8.; Stair, b. 2. t. 3. § 16.; which he certainly did not do in this case, merely by producing the disposition by Messrs Lyon and Dundas, without the commission empowering them to grant it.

Answered: 1st, The commission from Lord Strathmore formed no part of Mr Proctor's title of enrolment. It was at best merely a link in his progress, which it was sufficient to refer to in his claim, and which he was not bound to produce; 10th February 1781, Haldane.

2dly, In all cases, the delivery of the precept of feifin, and of a conveyance to it *ex facie* regular, is a sufficient warrant to the Bailie to give infeftment; Stair, b. 3. t. 2. § 17.; Ersk. b. 2. t. 3. § 35.; Office of a Notary, p. 71. and 76.; and in practice nothing further is required. Nor can any harm arise from this; because, if it should afterwards appear that the conveyance of the precept flowed *a non habente*, the feifin will be void; while, on the other hand, to sustain this objection would strike at the rights of many landed proprietors.

The first only of these objections was stated before the freeholders; and they having sustained it, Mr Proctor presented a petition and complaint against their judgment, and, at the same time, produced an extract of the commission to Messrs Lyon and Dundas.

On advising the complaint, with answers for Sir David Carnegie, in which the objection to Mr Proctor's feifin was first made, a majority of the Court thought the decision of the freeholders right on the first objection, which rendered it unnecessary to determine the second.

But on advising a reclaiming petition for Mr Proctor, with answers, the Court altered their opinion, and thought both objections should be repelled. The commission by Lord Strathmore, (it was observed), forms no part of Mr Proctor's titles, although, in order to support them, he is no doubt bound to produce it if required. But as a claimant may not have it in his power instantly to exhibit collateral or suppletory evidence of this sort, it is fixed by the case of Gordon of Whitelaw *, that if he should be rejected

by

* Stated in Wight's Treatise on Elections, p. 143.

by the freeholders for not doing so, he may remove the objection, by afterwards producing it in this Court.

The objection to Mr Proctor's seisin, is neither sanctioned by the statute 1693, nor by practice.

The Court unanimously repelled the objections.

For the Complainer, *Lord Advocate Dundas, Solicitor-General Blair, Geo. Fergusson, Ar. Campbell junior.* *Alt. H. Erskine, Hay, M. Ross, Gillies, Robertson Scott.*
Hume, Clerk.

R. D.

N^o CCXV.

May 18. 1796.

Lady ELISABETH MAITLAND and Others,

AGAINST

The REPRESENTATIVES of William Mitchell, and John Arnot.

ARBITRATION.—TUTOR AND PUPIL.—(1.) *A submission entered into by a quorum of tutors, "taking burden upon them for their pupils," falls by the death of one of the quorum.*

(2.) *A submission entered into by the tutors of a female minor falls by her marriage, unless her husband become a party to it.*

DAVID GAVIN left at his death four daughters, all of them under pupilarity, to whom he named Lady Elifabeth Maitland, their mother, the Earl of Lauderdale, and others, to be tutors and curators, Lady Elifabeth and any other tutor to be a quorum.

In 1779, Lady Elifabeth and Lord Lauderdale entered into a submission with Alexander Deas, together with William Mitchell and John Arnot, as his cautioners, respecting certain claims which their pupils and Deas had against each other.

By this deed, Lady Elifabeth and Lord Lauderdale, "as tutors, "and taking burden upon them for their pupils," on the one part, and Alexander Deas, with consent of his cautioners, on the other, obliged themselves to fulfil the award of the arbiters; and his cautioners further agreed, 'That in case any sum shall be found due "by the said Alexander Deas, the said arbiters shall decern them, "their heirs and successors, jointly and severally, with the said "Alexander Deas, in payment thereof."

The submission was kept in force by repeated prorogations for 13 years; in the course of which the Earl of Lauderdale and John Arnot died, Mr Gavin's eldest daughter was married to the Earl of Breadalbane, the second to Robert Baird, and all his daughters had attained majority.

In 1793, the arbiters pronounced a decree-arbitral, finding a balance of L. 891 : 10 : 8 due by Deas; and ordaining him, Mitchell, and the representatives of Arnot, to make payment of it to Lady Elisabeth Maitland, for behoof of Mr Gavin's representatives.

Soon after the date of this award Mitchell also died.

Lady Elisabeth, with concurrence of Lord and Lady Breadalbane, Mr and Mrs Baird, and her only other surviving daughter, afterwards brought an action against the representatives of Mitchell and Arnot, for payment of the sum awarded, which, in consequence of family-settlements, belonged wholly to Lord Breadalbane.

In defence it was

Pleaded: 1st, Lord Lauderdale, by taking burden on himself for his pupils in the submission, became a party to it, not merely as a tutor, but in his individual capacity; and therefore the decree-arbitral is void, from being pronounced after his death. Besides, as the submission was signed only by Lady Elisabeth and his Lordship, it fell at any rate by his death, there being no longer a quorum of the tutors parties to it.

2^{dly}, The submission fell by the Miss Gavins attaining majority before the award was pronounced. The tutors after that had no right to appear in it for their former pupils; and as little could the Miss Gavins, or the husbands of the two who were married, appear for themselves, as they were neither original parties to the submission, nor did they afterwards accede to it.

3^{dly}, John Arnot's death, before the date of the award, of itself, put an end to the submission.

Answered: Lord Lauderdale had no patrimonial interest in the submission, and could therefore be a party to it only in his tutorial capacity. And, as the deed of a quorum of tutors effectually binds the rest, the whole, in the eye of law, were parties to the submission; and consequently it remained in force notwithstanding his Lordship's death; Fount. 18th January 1711, Ayton.

2^{dly}, Although contracts, such as leases entered into by tutors for behoof of their pupils, to endure for a definite period, may not, in general, be binding on the pupils beyond their majority, this will not hold with regard to a decree-arbitral, on a submission by a tutor, which is pronounced after his office is at an end. In the one case, the tutor ties up, unnecessarily, the hands of his ward; in the other, he enters into a beneficial transaction for him, which he may *bona fide* suppose will be finished during his administration, and by which the pupil, from the nature of the thing, must continue bound till it be brought to a conclusion.

3^{dly},

3dly, Arnot's death can have no effect in terminating the submission. He signed it not as a party, but merely as cautioner for Deas, an obligation which he might have undertaken just as well by a separate deed.

The Lord Ordinary took the cause to report.

The Court had no occasion to judge of the defences arising from the expiration of the tutory, and the death of Arnot before the date of the award, being clear that it was null on the other grounds stated for the defenders. Lord Lauderdale (it was observed) bound himself personally, by taking burden for the pupils in the submission, and being thus patrimonially interested, it fell by his death. Besides, as Lord Breadalbane, on his marriage, obtained right to the sums claimed by the tutors under the submission, the proceedings of the arbiters, subsequent to it, were inept, from his not having been a party to them.

The Lords unanimously "affoizied the defenders."

A reclaiming petition was refused, (17th June 1796), without answers.

Lord Ordinary, *Glenlee.* Aft. *H. Erskine.* For Mitchell's Representatives,
Maconochie. For Arnot's Representatives, *R. Craigie.* Clerk *Menzies.*

R. D.

N° CCXVI.

May 19. 1796.

CHARLES CAMPBELL, Trustee for the Creditors of Thomas Houston, and others,

AGAINST

FRANCIS BLAIKIE, Trustee for the Creditors of Ramsay, Smith, Graham and Company, both as a Company and as Individuals.

SOCIETY.—BANKRUPT.—COMPETITION.—*The creditors of an insolvent Company are entitled to rank on the private estates of the partners pari passu with their private creditors.*

FRANCIS BLAIKIE, trustee on the sequestrated estate of Ramsay, Smith, Graham and Company, and likewise on the private estates of the partners, proposed to rank the Company creditors exclusively

sively on the funds of the Company ; and these being insufficient for their payment, to rank them afterwards, *pari passu* with private creditors, on the private estates of the partners.

To this Charles Campbell, trustee on the sequestrated estate of Thomas Houston, a private creditor of one of the partners, and some other creditors of the same description,

Objected: As the creditors of a Company are preferred on the funds of the Company, it is fair that the private creditors of the partners should have a similar preference on their private estates. The former trust to the funds of the Company for their payment, while the latter, in general, give credit to an individual partner on the faith of his private fortune, without placing any reliance on his copartnery concerns, which may be altogether unknown to them. Accordingly, the preference contended for is established in England, where general questions of this nature have been longer an object of attention than in this country ; Green's Spirit of the Bankrupt Laws, p. 154. ; Cook's System of Bankrupt Laws, p. 163.

Answered: The creditors of a Company are preferred on its funds, because the stock of the Company is, in law, held to belong not to the partners, but to the Company, considered as an *universitas*, against which the partners, and consequently their private creditors in their right, have a *jus crediti* only for the residue after payment of the debts of the Company ; l. 27. ff. *pro socio* ; Ersk. b. 3. tit. 3. § 24. But, on the other hand, the partners are liable *singuli in solidum* for the debts of the Company, which are therefore, in reality, the private debts of each partner, and, as such, must rank on his private estate. Such, accordingly, has been the uniform practice and understanding in this country ; 4th July 1776, Dunlop against Spiers *, affirmed, on appeal ; and a contrary rule would greatly weaken the credit of Companies, as it is upon the confidence in the responsibility of the partners, and not in the stock of the Company, that their credit is generally supported.

Upon advising memorials, the Lords, on the grounds stated for Blaikie, " found, That the creditors of Ramsay, Smith, Graham " and Company, are entitled to rank on the private estates of " the individuals partners of said Company along with the private creditors of such partners ;" but ordered a hearing in presence as " to what extent : Whether to the full amount of their " original debts, or only for the balance due after deduction of " what they drew from the Company estate †."

For the objectors, *Tait.*

Alt. Cullen.

Clerk, Colquhoun.

D. D.

* Dct. vol. iv. p. 292.

† *Note.* This last question was not decided till November 1796.

N^o CCXVII.

May 19. 1796.

The REPRESENTATIVES of John Dunn,

A G A I N S T

PETER JOHNSTON and others.

RANKING and SALE.—*A decree of certification does not bar a creditor from obtaining a preference, upon an adjudication afterwards led, on grounds of debt produced before the decree was pronounced.*

PETER JOHNSTON brought a ranking and sale of the estate of William Colhoun, in which decree of certification was pronounced, 29th February 1792.

A personal creditor, who had produced his grounds of debt before that period, having afterwards raised a process of adjudication, Peter Johnston, and all the creditors who had produced grounds of debt, except John Dunn and another, were conjoined in the decree, which was pronounced 8th June 1792.

The decree of certification was not extracted till 31st May 1794, and it was in the extract that the adjudication was first mentioned as being produced as an interest.

The common agent having afterwards, in the order of ranking, proposed that Dunn should be postponed to the creditors interested in the adjudication, his representatives objected, That it was struck at by the decree of certification, and

Pleaded : By the summons of sale, “ The whole grounds of debt, “ rights and diligences,” affecting the estate are called for ; and after decree of certification is pronounced, and the 10 days allowed by it are elapsed, no production of any sort can be made without an application to the Court, to have the certification recalled ; 25th January 1783, Craig against the Creditors of Riccartonholm ; and that application will not be listened to, where its object is to allow the creditor who makes it to get a preference. As no application, however, was made for recalling the certification in this case, and as the adjudication was not produced as an interest for so long a period after it was obtained, the objectors were led to believe that its sole object was to enable the creditors to draw their dividends ; and on the faith of this they have lost the opportunity of adjudging, so as to come in *pari passu*.

6 O

Answered :

Answered: It is not thought necessary, in practice, to apply for having a decree of certification recalled, in order to authorise a production, where the decree has not been extracted. Besides, the adjudication was not struck at by the certification, which, in terms of the act of federunt, 17th January 1756, is directed solely against grounds of debt existing, and not produced, at its date, and does not prevent creditors from afterwards acquiring preferences by diligence; 22d November 1785, Grierson against Douglas, Heron and Company; see also 12th July 1785, Massey against Smith; 29th January 1796, Cheap against Campbell *.

The Lord Ordinary sustained the objection to the order of ranking.

But the Court, upon advising a reclaiming petition, with answers, were, in general, of opinion, that the objection was ill-founded. The decree of certification, (it was observed,) strikes against grounds of debt not produced, but not against posterior diligence on productions already made; and it makes no difference whether the decree is or is not extracted. The case of Riccartonholm was erroneously decided.

The Lords repelled the objection.

Lord Ordinary, *Polkemmet*. For the objectors, *H. Erskine*. Alt. *Geo. Fergusson*.
Clerk, *Menzies*.

D. D.

* No. CXC VII.

N° CCXVIII.

N^o CCXVIII.

May 21. 1796.

Mrs JANET YOUNG and her Husband,

A G A I N S T

Mrs JANET SINCLAIR and others.

PENALTY.—*A decree in foro, "in terms of the libel," upon a bond containing a penalty, does not include expences of process.*

CAPTAIN ALLAN granted Mrs Janet Young an heritable bond of annuity for a certain sum, "with a fifth part more of li-
"quidate expences in case of faillie." After his death, a doubt having arisen among his representatives which of them should be ultimately liable in payment of it; Mrs Young brought an action against one class of them, concluding for the arrears due to her, and for punctual payment of the annuity in time to come, "and
"one-fifth part more, being the liquidate penalty and expences,
"or stated damages arising from the failure in the regular pay-
"ment of the said annuity, and costs and charges incurred in en-
"forcing payment thereof."

The Lord Ordinary, after hearing parties, "decerned against
"the defenders in terms of the libel; but, upon payment of the
"annuities, ordained the pursuers, upon the defenders expences,
"to grant an assignation in the defenders favour." A decree, in
these terms, was afterwards extracted.

Mrs Young having claimed expences of process under this decree, Mrs Sinclair and the other defenders raised a suspension, in which they contended, that where a Judge, after hearing parties, pronounces a judgment which is silent with regard to expences of process, none are understood to be given; *l. 3. cod. de fruct. et lit. imp.*: That where a party extracts a decree, without craving an express judgment on that point, the incontrovertible presumption is, that he was convinced, if he had asked expences when the Judge was master of the case, they would have been refused; and that this held although the decree was in terms of a libel concluding for a penalty; 23d December 1757, Young against Allan; 27th November 1761, Gordon against Maitland.

Answered: Whatever may be the case when an action is brought for payment of a debt not secured by a penalty, and the summons contains a random conclusion for expences, where the document of debt contains a penalty which is concluded for in the summons,

a decree, in terms of the libel, must include expences of process. In other cases they are given, because there has been some fault on the part of the defender; but when a conventional penalty is sustained to the extent now claimed, the ground of judgment is, that a party cannot, from considerations of equity, be deprived of the full penalty, which, at strict law, is due to him, without at least being indemnified for the expence incurred by him in making his debt effectual; *Kilk. voce Penalty*, 4th January 1740, Couper; 19th June 1788, Allardes against Morison.

The Lord Ordinary on the bills reported the cause on memorials.

Observed on the Bench: When a decree is pronounced in terms of the libel, in absence of the defenders, the actual expences of process are included; but they are not included where the decree is *in foro*, unless they are expressly given.

The Lords unanimously remitted to the Lord Ordinary to pass the bill, *quoad* the charge for expences of the former process.

Lord Ordinary, *Polkemma*. For the charger, *Montgomery*. Alt. *Tod*.

D. D.

N° CCXIX.

May 31. 1796.

JOHN AITCHISON and others,

AGAINST

The MAGISTRATES and Billet-Master of Haddington.

PUBLIC BURDEN.—*All the inhabitants of a royal burgh are indiscriminately liable to have soldiers billeted upon them, except schoolmasters, unmarried women, and paupers.*

THE Magistrates of Haddington had, from time immemorial, directed their billet-master to quarter soldiers, first on bakers, brewers, butchers, inn-keepers, grocers, and retailers of ale and spiritous liquors, and upon the rest of the inhabitants only in cases of emergency.

The persons primarily subjected to this burden brought a suspension against the Magistrates and the billet-master, in which they concluded,

concluded, that it ought to fall indiscriminately on all householders.

The arguments used in both sides were, in substance, the same with those stated in the report, 3d June 1794, Crawford against Wilson*.

The Lord Ordinary found, "That the quartering of soldiers in the town of Haddington should be equally upon the whole of the inhabitants without distinction, and therefore, suspended the letters *simpliciter*."

And, on advising a representation for the chargers, with answers, his Lordship "found, That schoolmasters, unmarried women, and paupers, could not be quartered upon; and with that variation, refused the desire of the representation."

The Magistrates having brought these judgments under review, three of the Judges were for altering them, and supporting the former practice of the burgh. The grounds on which they went were the same with those stated for the pursuers in the report, 6th February 1789, Earl of Wemyss against The Magistrates of Canongate.

A great majority of the Judges, however, were for adhering to the judgments of the Lord Ordinary, precisely on the grounds stated in the opinion of the Court in the case of Crawford.

The Lords "adhered."

Lord Ordinary, *Justice-Clerk*.
Clerk, *Sinclair*.

A. C. Brown.

Alt. Walker Baird.

R. D.

* No. CXXI.

N° CCXX.

May 31. 1796.

JOHN ZEPHANIAH HOLWELL, and his Attorney,

AGAINST

LADY CUMING.

PRESUMPTION.—*A bond of provision by a father to his daughter, found in the repositories of her grand-uncle by the father's side, presumed to have been held for behoof of the father.*

CAPTAIN WEDDERBURN, after having been many years abroad in the service of the East India Company, returned to Scotland; and in 1768 he granted a bond for L. 4000, payable after his death, to his then only child, now Lady Cuming.

The bond bore to be granted for "love, favour, and paternal affection," and "in order to secure her in a suitable provision." It contained no power of revocation, nor dispensation with delivery.

Soon after granting the bond, Captain Wedderburn returned to India, where he died in 1777. After the date of the bond he was twice married. He named his third wife, his executrix, who intromitted with his whole effects in India.

His property in this country was sold by judicial sale; and after paying a preferable creditor, Lady Cuming received the reversion, which was about L. 1000, in part payment of her bond.

In 1789, John Zephaniah Holwell, a creditor to Captain Wedderburn, by a bond for L. 1704 : 19 : 4, granted in India in 1769, and upon which no interest had been paid since 1774, brought an action against Lady Cuming, as representing her father, and in 1790, raised a reduction of the bond, on the act 1621.

These actions were conjoined.

In the course of procedure evidence was led by the pursuer, to establish that his bond in 1769 was a renewal of one granted in 1766; and he contended, that Captain Wedderburn was even then insolvent.

The defender controverted the evidence of the priority of the debt, and denied that her father was ever insolvent.

The pursuer farther stated, that, independently of these circumstances, as the defender's bond was revocable till her father's death, she fell to be postponed to his onerous creditors. The defender answered, that the bond was, immediately on its execution, delivered to Mr Wedderburn of St Germans, her father's uncle,
from

from whose widow she afterwards received it: That the object of delivering it to him, was to put it out of the power of her father, who was then on the eve of a second marriage, to revoke it; and that accordingly it contained no power of revocation, and bore to be granted for the defender's *security*. The pursuer said there was no evidence of the bond having been delivered to Mr Wedderburn; and farther denied that that circumstance created any presumption in favour of the defender;

Pleading: Where there are no express terms of depositation, a bond of provision by a father to a child, found in the possession of a third party, is presumed to have been delivered to him for behoof of the granter, during his lifetime, and only after his death, for behoof of the grantee; Stair, b. 1. tit. 13. § 4.; Dict. vol. ii. p. 155.; Fount. 16th November 1697, Simpson against Finlay. So far from there being any thing to elide this presumption in the present case, Mr Wedderburn of St Germans was the person to whom the deeds of the granter were naturally entrusted in his absence.

Answered: The general presumption is, That a deed in possession of a third party is held for behoof of the person in whose favour it is executed; Stair, b. 1. tit. 7. § 14.; b. 4. tit. 42. § 8.; Bankton, vol. i. p. 510.; and in this respect there is no distinction between onerous and gratuitous deeds; Erskine, b. 3. tit. 2. § 43.; Stair, 5th July 1662, Drummond against Campbell; Durie, 11th June 1630, Fairlie against Fairlie; Kilk. *voce* Presumption, 3d January 1750, Riddel against Inglis. When the granter of a deed wishes to retain his power over it, after putting it into the custody of another, he ought either to reserve a faculty of revocation in the deed itself, or take an obligation from the depositary to restore it on demand: Further, it cannot be disputed, that the pursuer's presumption would be elided by the oath of the depositary; but, upon his death, according to the pursuer's doctrine, proof of the fact would become impossible, even in cases where delivery was expressly made for behoof of the grantee.

The Lord Ordinary reported the cause on informations.

Some of the Judges thought the whole circumstances of the case afforded evidence that the bond was delivered for behoof of the defender, who, as Captain Wedderburn, in their opinion, was not then insolvent, fell to be affoizied.

But a great majority thought the action well founded. The insolvency of Captain Wedderburn, which, in the circumstances of the case, was to be presumed *retro* to the date of the bond, was mentioned as one foundation of this opinion; but the decision was rested chiefly on the general presumption pleaded for the pursuer.

The

chasing the rights of creditors, provided they make no use of them as a title to possess the estate. Accordingly, since the date of the statute, the mere act of purchasing a debt has in no case been found to infer a passive title; and, with the exception of Mr Erskine, it has been the uniform opinion of lawyers, that a passive title was not incurred by so doing; Fountainhall and Forbes, 7th June 1710, Watson; 20th July 1759, Macneil; Bankton, vol. ii. p. 354. § 101. p. 369.

Two of the Judges considered themselves obliged, by the words of the statute, to hold the mere act of purchasing a debt sufficient to infer the passive title; but the rest, upon the grounds last stated, were of the opposite opinion. The defender, (it was further observed), by bringing the estate to sale, had acted fairly, and had constituted himself trustee for all concerned; and if, in purchasing the debts, he should obtain any benefit, he would be bound to communicate it to the other creditors.

The Lords found, "That the purchase of the debts in question by the defender, upon his father's estate of Barbreck, does not subject him in an universal passive title, and therefore repelled the defences: Found the defender bound to fulfil the agreement entered into with the pursuer, in terms libelled."

Lord Ordinary, Swinton.

A& Lord Advocate Dundas, A. Campbell junior.

Alt. Solicitor-General Blair, Geo. Fergusson.

Clerk, Home.

D. D.

N^o CCXXII.

June 14. 1796.

JAMES BRODIE.

AGAINST

The MAGISTRATES and TOWN-COUNCIL of Nairn, the Earl of FINLATER, and DAVID DAVIDSON.

SALMON-FISHING.—PROPERTY.—*When a person has a grant of salmon-fishing in a river, which, at the date of the grant, ran into the sea opposite to his own lands, upon its afterwards changing its course, and discharging itself into the sea opposite to the property of his neighbour, who has a right to the sea-fishing there, the former continues to have an exclusive right to the fishing in the river, so far as it is distinguishable from the sea.*

THE property of the burgh of Nairn, on the Murray Frith, is bounded on the east by the barony of Lochloy and Inchloch, belonging to James Brodie. In 1589, James VI. granted a charter

charter to the Magistrates of the burgh, and their successors, confirming their former privileges, and particularly, that “ lie
 “ zaires infra fluxum maris dicti portus construendi, ac super lie
 “ stellis, tam in aqua dulci quam salsa, infra omnes bondas et li-
 “ bertates, dicti nostri burgi piscandi, cum libertate de lie tug-net
 “ infra mare, aliisque omnibus privilegiis, asiamenis, libertatibus
 “ et commoditatibus in quibus ipsi, eorumve predecessores, ali-
 “ quibus temporibus, retroactis in usu et possessione extiterunt infra
 “ dictum nostrum vicecomitatum de Nairn.”

These fishings were afterwards feued out by the burgh, and now belong to the Earl of Finlater and David Davidson.

Mr Brodie and his predecessors have, from time immemorial, been infest, “ in all and sundry fishings of the said lands of
 “ Lochloy and Inchoch, as well of salmon as other fishings, as well
 “ in salt as in fresh waters.”

The burgh, or their vassals, had been accustomed, besides their sea or stell fishings, to possess exclusively the fishings in the river of Nairn, which ran eastward into the sea, opposite to, and considerably within, the property of the burgh; but as the coast consists of loose sand or gravel, the river frequently shifts its channel; and about twenty or thirty years ago, it came to run into the sea, at low-water, opposite to the property of Mr Brodie.

In order to settle a variety of questions which arose in consequence of this change in the course of the river, Mr Brodie brought an action of declarator against the Magistrates of Nairn and their vassals, in which a proof was led.

The boundary between the respective sea-fishings was fixed by the Court, according to the title-deeds of the parties, and the evidence adduced.

As to the fishing in the river, it was thought, that, at low-water, the defenders had an exclusive right to it, notwithstanding the change in the course of the river, agreeably to the decision, Kames, December 1752, Straiton against Fullarton, as varied by the judgment of the House of Lords, 8th April 1756; and that, at high-water, the fishing in the river, so far as covered by the sea opposite to the pursuer's property, was included under his sea-fishing.

The Lords unanimously found, “ That the pursuer has no right
 “ of salmon-fishing in the river of Nairn, so far, and at such times,
 “ as the stream of water of the said river can be distinguished
 “ from the water of the sea.”

Lord Ordinary, *Justice-Clerk.* *Act. Solicitor-General Blair, M. Ross, Monypenny.*
 Alt. Geo. Fergusson, C. Hope. *Clerk, Gordon.*

D. D.

N^o CCXXIII.

June 15. 1796.

The Reverend DAVID BROWN,

A G A I N S T

WALTER HUNTER.

TEINDS.—*The right of the minister to the vicarage-tithes of bog-hay will not entitle him to claim the tithe of hay from sown grass, although bog-hay should no longer grow in the parish.*

MR BROWN, minister of Crailing, raised an action of declarator against Walter Hunter, and the other heritors of the parish, for ascertaining his right to draw vicarage-teinds, in the course of which he established, that his predecessors had been in use of drawing the tithes of a variety of articles, and among others, of bog-hay. It appeared, however, that no hay of this sort now grew in the parish, and that it never had been produced in any considerable quantities, except on a piece of ground called the Warlie Meadow, which, for many years past, had either been pastured or in tillage.

The Lords, “on advising the proof, found, That the pursuer, as minister of the parish, is titular of the vicarage-tithes payable out of the lands belonging to the defender, (Mr Hunter), and has right to draw the tithe of lambs, wool, lint, hemp, and natural hay, but not of hay made from sown grass.”

Mr Brown reclaimed against this judgment, in so far as it denied him the tithe of artificial hay, and

Pleaded: The disuse of bog-hay has arisen from the improved state of agriculture, the same land which formerly produced it being now sown frequently with artificial grass. It would be hard, therefore, that while the heritor profits, the minister should suffer. Besides, there is not that essential difference between the two sorts of hay which can admit of the one being tithable, and the other not. And although the minister be a gainer by the improvement in the quality of the hay, it is equitable that he should be so, in order to compensate for the loss he may sustain by other articles of produce going into disuse. Thus hemp, an article liable to vicarage-tithe, and formerly produced in great quantities, is no longer raised in the parish.

Answered:

Answered for Mr Hunter: Custom is the sole rule, both as to the place whence vicarage-tithes are to be drawn, and the articles liable to be tithed; Stair, b. 2. t. 8. § 6.; Bank. vol. ii. p. 53. § 140.; Forbes, p. 351.; Stair, 24th November 1665, Bishop of the Isles; 28th November 1676, Schiel; 11th February 1665, Scott. But the proof establishes the pursuer's right to bog-hay only, a species totally different either from ley-hay or sown grass. Both are greatly more valuable, and the latter is raised only upon ground in a high state of cultivation, which no farmer would sow with seed gathered from bog-hay. Besides, were the pursuer to prevail, the defender would not, as formerly, have to pay the tenth of the spontaneous produce of the ground, but a tenth of the return for the money which he has laid out, and for the seed and industry which he has bestowed; and thus the improvement of the country, would be discouraged, and the value of the pursuer's vicarage tithes exorbitantly increased. Neither is the disuse of bog-hay any real hardship on him. It was at no period of much value; and, at any rate, it is an inseparable quality of tithes of all sorts, that they import no restriction upon proprietors in the cultivation and management of their grounds.

At all events, the claim could reach only to sown grass growing on Warlie meadow, there being no proof of the tithe of bog-hay having been drawn from any other part of the parish; 29th November 1678, Birnie.

Several of the Judges were for supporting the pursuer's claim. It is hardly possible (it was observed) to draw the line between one sort of hay and another; and by such a distinction, the payment of teinds from hay might be entirely evaded, merely by throwing a few seeds among natural grass.

A considerable majority were, however, for refusing the desire of the petition. All attempts (it was said) to extend the right of the titular are justly unfavourable. Bog-hay is a different species from artificial grass, and teinds admit of no *surrogatum*.

The Lords "adhered."

• Lord Ordinary, *Esgrove*.
Alt. *Rolland, R. Hodgson Gay*.

A.R. *Arch. Campbell junior*.
Clerk, *Home*.

R. D.

N^o CCXXIV.

June 21. 1796.

ROBERT SKIRVING and GEORGE YOUNG,

AGAINST

ROBERT VERNOR.

TACK.—KIRK.—PART AND PERTINENT.—*Suitable accommodation in that part of the area of the parish-church which belongs to the landlord, is held to be included in a lease of lands.*

ROBERT VERNOR, in 1763, obtained a lease of a farm belonging to the Earl of Wemyss, in the parish of Inveresk. His Lordship's factor, at the same time, wrote a letter to him, mentioning, that as he had agreed to repair and keep in good order his Lordship's property in the church during the lease, he was in return to be allowed to possess or sublet the whole of it.

Vernor's lease expired, and was renewed in 1783; and he continued to possess and let out the Earl's seats in the church as formerly, but without any express authority from his landlord. In 1794, however, Robert Skirving and George Young, who hold large farms in the parish under the Earl, on leases commencing in 1792, which give them right to the lands, "with all liberties and freedoms belonging thereto," presented, with consent of their landlord, a petition to the Sheriff, praying that the area in the church belonging to the Earl might be divided among his tenants, according to the rents paid by each.

A plan was accordingly made out, and the Sheriff ordered the division to take place in terms of it.

In an advocacy, Vernor, *inter alia*, disputed the title of the pursuers to insist in the division, as their leases gave them no express right to seats in the church; contending, that the area of the church is the property of the heritors, who may sublet it at pleasure; and that, accordingly, the Earl of Wemyss had exerted that right, by his grant to the defender, which must be considered as renewed with his lease of the lands.

The pursuers

Answered: The right of an heritor in the area of the church is not personal to himself, but is inseparable from the possession of the lands, and common to himself, his family and tenants; the pursuers, therefore, would have been entitled to make their present claim, although their leases had not expressly given them all the freedoms and liberties connected with the lands, and even in opposition to the Earl of Wemyss; but the clause in the lease, and the

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the consent of his Lordship, make their case the more favourable. Besides, Vernor's grant of the seats has not been renewed along with his lease of the lands.

The Lord Ordinary reported the cause on memorials.

The Lords remitted "to the Sheriff, to find, that the Earl of Wemyss's tenants in the parish of Inveresk are entitled to be accommodated with suitable seats in their parish-church of Inveresk, and to make a fair and equitable division of his Lordship's area in that church accordingly; and found Messrs Skirving and Young entitled to their expences."

Lord Reporter, *Methuen.* *A. Cullen.* *Alt. Corbet.* Clerk, *Sinclair.*

D. D.

N^o CCXXV.

June 24. 1796.

GEORGE STEWART,

AGAINST

The REPRESENTATIVES of Patrick Grimmond.

REMOVING.—*The heirs of a tenant for life may be removed summarily between terms.*

IN 1740, Patrick Grimmond entered into possession of the mill and mill-lands of Airtully, on a liferent lease. He died 19th April 1796, and on the 25th of that month, Mr Stewart the landlord presented a petition to the Sheriff of Perthshire, praying, That his representatives might be removed summarily from the possession.

The Sheriff-substitute pronounced the following interlocutor:
" Finds it alleged by the pursuers, and not denied by the defender, that Patrick Grimmond, the liferent tacksmen of the farm in question, died upon Tuesday the 19th April last: Finds, That in so far as the grounds were sown at the death of the liferenter, the defenders will be entitled to reap the crop thereof, on paying a proportion of the whole rents effecting thereto; but finds, that they have no right nor title to sow or reap any other part of the farm, nor to use the grass thereon, whether sown or natural; and decerns summary removing against them, with the explanation foresaid: And with this further explanation, that in so far as the defunct has laboured ground not sown at the time of his death, or the defenders since that period have laboured such
" ground.

“ ground, the pursuer must pay a *bona fide* price for such labour;
 “ and further decerns the defender to pay the pursuers L. 20 Scots
 “ of damages and expences in case they fail to remove; but super-
 “ fedes extract till to-morrow at eleven o'clock forenoon.”

A bill of advocacy, presented by Grimmond's representatives, against this judgment having been refused, they presented a reclaiming petition, containing an argument in law, substantially the same with that which was maintained by Michie's representatives, in the question between them and Baron Gordon. See N^o. CXLVI.

The Court considering it as fixed by that decision, That the representatives of a liferent lessee may be removed summarily, unanimously “ refused the petition,” without answers.

Lord Ordinary, Swinton.

For the Petitioners, Hagart.

Clerk, Colquhoun.

R. D.

N^o CCXXVI.

June 29. 1796.

Mrs JEAN DOUGLAS,

AGAINST

JOHN MASON.

ARRESTMENT.—TRUST.—*When an heritable subject is vested in trustees for payment of legacies, the interest of the legatees may be attached by arrestment.*

COMPETITION.—*An arrestment and an assignation ranked pari passu, where the execution of the former bore to have taken place between one and two, and the intimation of the latter between two and three of the afternoon of the same day.*

JANET BUCHANAN conveyed her estate of Craigievern in trust, for payment of her debts and legacies, particularly of L. 100 left by her to Walter Monteath, which, upon her death, he assigned to his mother Mrs Jean Douglas. The assignation was intimated to the trustee on the 3d March 1792, between two and three in the afternoon, as appeared from a jotting on the assignation signed by him, but not holograph.

John Mason, a creditor of Walter Monteath, used an arrestment in the hands of the trustee, as the execution bore, between one and two of the afternoon of the same day.

At

At this time the trust-estate had not been sold. After the sale, the trustee brought a multiple-poinning against Mrs Douglas and John Mason; in which Mrs Douglas objected to Mason's interest, That as the trust-estate was heritable in March 1792, Walter Monteath's interest in it could not be attached by arrestment; Durie, 29th July 1634, Laird of Lugton against Creditors of Dishington.

Answered: Walter Monteath had a *jus crediti* against the trustee, for attaching which, arrestment was the proper diligence; 25th February 1780, Grierson against Ramfay.

The Lord Ordinary preferred John Mason.

Upon advising a reclaiming petition, with answers, the Court considered the competency of the arrestment to be settled by the case of Grierson. And it was further observed, That, in order to give an arrestment a preference to an assignation, Lord Stair is of opinion, that the execution of the one must precede the intimation of the other at least three hours; and that at least there must be such an interval of time between them, as to preclude the possibility of mistake as to their priority, of which, particularly as the two acts were not performed by the same person, there was not in this case sufficient evidence.

The Lords "found, That the parties fell to be preferred *pari passu*."

Lord Ordinary, *Swinton*.
Alt. *Cha. Brown*.

For Mrs Douglas, *Arch. Campbell junior*.
Clerk, *Home*.

D. D.

N° CCXXVII.

June 30. 1796.

MARK PRINGLE,

A G A I N S T

Major GEORGE LEWIS MACMURDO.

TACK.—IMPLIED OBLIGATION.—*A tenant is not entitled to dispose of any part of the fodder raised on his farm, except his hay, and the straw of his outgoing crop.*

MAJOR MACMURDO obtained from Mark Pringle a lease of the farm of Fairnilee in Selkirkshire, for eleven years and a half, by which, besides obliging himself to pay a suitable rent, he became bound to lay down a considerable part of the lands with barley, clover, and rye-grass, “two years previous to the issue of the tack, and to leave the same in grass at that period; the land to be properly manured with lime or dung with the barley crop.”

Major Macmurdo, at first resided on this farm, but he afterwards took another in Dumfries-shire, to which he removed, leaving Fairnilee to be managed by servants.

In autumn 1795, Major Macmurdo advertised a sale of the growing crop upon it; reserving as much as was necessary for the maintenance of the servants and horses employed on the farm.

Mr Pringle applied to the Sheriff to prohibit the sale.

The Sheriff ordered Major Macmurdo to give in a condescendence, from which it appeared, that the farm consisted of 63 acres, of which 23 were under crop, that there had been 17 bolls of oats sown on it, and that it had been chiefly laboured by two horses.

The Sheriff afterwards appointed certain farmers “to visit and inspect the corns upon the farm of Fairnilee, and to set off as much thereof as should be sufficient for the maintenance of two horses, from the time the corn should be reaped until Whitsunday next; appointed the defender to consume the same upon the farm, with such beasts as he should think proper for that purpose; and granted warrant to sell and dispose of the remainder of the crop, he always finding caution to the pursuer for the current year’s rent.”

The sale accordingly took place; but two days after, Mr Pringle applied for an advocacy of the process, and an interdict, to prevent the corns from being carried off the grounds.

The

The interdict was at first granted; and afterwards the Lord Ordinary on the bills passed the bill, but, "in respect that part of the crop was sold in terms of the Sheriff's interlocutor, before the bill was presented, removed the interdict, without prejudice to any claim of damages competent to the complainer, on account of part of the crop being sold."

In the advocacy, the pursuer contended, *1mo*, That it necessarily followed, from the clause in the lease obliging the defender to leave part of the farm properly manured, that he was to consume the whole fodder upon it. *2dly*, That at any rate, this was an implied obligation on every lessee of lands; Gilmour, N^o 144.; 1776, Macmurray against Sir William Maxwell; 1785, Duke of Roxburgh against Archibald*.

The Lord Ordinary found, "That though there was no express clause in the contract of lease granted by the pursuer Mr Pringle to the defender Major Macmurdo, which ties him down from carrying off, or otherwise disposing upon, the whole fodder or straw that may be produced on the farm of Fairnilee, yet that he is not at liberty so to do, in opposition to the will of the landlord; as, were such conduct to be tolerated, it would be attended with ruinous consequences to the ground, as well as repugnant to the general mode of cultivation in the country; and therefore prohibited and discharged the defender from selling off in future, either by public roup or private bargain, the fodder on said farm of Fairnilee, and ordered him to consume the same thereon during the remainder of his lease."

And his Lordship, on rehearing the cause, found the defender "was entitled to sell his hay, and the straw of his outgoing crop, but *quoad ultra* adhered to the former interlocutor."

In a reclaiming petition, the defender stated, in point of fact, that he had made great improvements on the farm since his entry to it; that he proposed to manure it with compost dunghills annually; and that it was the practice in Selkirkshire for tenants to sell corns on the foot without challenge.

In point of law, he

Pleaded: The lease in question contains no stipulation which infers a prohibition on the tenant to dispose of the fodder produced on the grounds, and no such limitation arises from the nature of the contract. A tenant is absolute proprietor of the fruits, and as such, may dispose of them as he thinks proper. The landlord can require nothing more than that he shall labour the ground *salva rei substantia*, and restore it, at the end of the lease, in as good condition as he found it; Ersk. b. 2. § 6. t. 39. Besides, the prohibition contended for would prevent the inhabitants of towns, and tenants of grass-farms, from providing themselves with straw for feeding and littering their cattle, and other purposes.

Observed

* The two last not collected.

Observed on the Bench: A tenant cannot sell fodder off his lands, unless he either bargain with the purchaser for the dung produced from it, or purchase as much for the use of his farm.

The Lords unanimously "refused the petition," without answers.

Lord Ordinary, *Craig*.

For the Petitioner, *Hay*.

Clerk, *Messies*.

R. D.

N^o CCXXVIII.

July 1. 1796.

WILLIAM MURCHIE,

AGAINST

JOHN MACFARLANE.

BILL OF EXCHANGE.—PRESUMPTION.—*Action refused on a bill where the date appeared ex facie to have been altered, though it did not appear by whom, or for what purpose the alteration had been made.*

WILLIAM MURCHIE, on the 4th July 1793, remitted to the agents for the Paisley Union Bank at Newton-Douglas, to be placed to his credit when paid, a bill drawn by John Caven, accepted by William Alexander, and indorsed by Caven, John Crossie and John Macfarlane, dated 17th June 1793, and payable two months after date. On the 5th July, the agents for the Bank wrote to Murchie, acknowledging receipt of the bill, and mentioning, that it would be payable on the 20th August; and it was accordingly marked, "17th-20th August," by one of the clerks.

The bill was protested for non-payment, on the 20th August, and the dishonour immediately intimated to all concerned, and particularly to Macfarlane; who, having afterward been charged for payment of it, raised a suspension, in which, *inter alia*, he stated, That the bill, when he indorsed and returned it to the acceptor, for whose accommodation it was executed, was dated 7th June: That the figure "1" was, *ex facie* of the bill, an after operation, performed perhaps by the acceptor, in order to postpone the term of payment, or by the charger, at his desire; and he proposed,

posed, that all the parties concerned in the bill should be examined, in order to expiscate the fact.

From this statement he inferred, that the letters should be suspended: *1mo*, Because, according to its proper date, the bill had not been duly negotiated: *2do*, Because the bill being *ex facie* a vitiated document, no action could be sustained upon it; 4th vol. Termly Reports, 1791, Master and others against Miller; unless, upon the principle of the decision, 27th January 1795, Gillespie against Graham, the charger could establish, both that he was *in bona fide* to receive the bill as a true document, (which, from the obviousness of the interpolation, he could not,) and that the mistake had been occasioned by some fraud or negligence of the suspender, which was not alleged.

The charger, on the other hand, admitted, that the figure "1" had a different appearance from the rest of the bill; but he objected to the competency of the examination proposed, and contended, that, in the circumstances of the case, the alteration could not affect the validity of the bill, in a question with him, an onerous indorsee: That a vitiation in a document is presumed fraudulent, and renders it null only where the holder of it can reap some benefit from the alteration; Dict. vol. ii. Presumption, p. 152, 153.; but that from its being established that the bill bore its present date so early as the 4th July, a period at which the charger could have no interest to make the alleged alteration, the sole effect of which was to postpone the term of payment, it must be presumed to have been made by some of the obligants in the bill before they quitted possession of it.

The Lord Ordinary sustained the reasons of suspension; and, upon a reclaiming petition, with answers, the Lords almost unanimously "adhered."

Lord Ordinary, Swinton.

For the Charger, Hay.

Alt. Turnbull. Clerk, Home.

D. D.

N^o CCXXIX.

July 5. 1796.

JOHN LOW,

AGAINST

ANDREW KNOWLES.

TACK.—ASSIGNATION.—*Where a lease is granted to assignees, how far is the original tenant liable to the landlord for the rent after assignation?*

REMOVING.—*The act of federunt 1756, § 5. does not apply unless the tenant be a full year's rent in arrear at the date of the decree; but the landlord is not obliged to accept of partial payments.*

JOHN Low held a lease of a farm, granted in favour of assignees: One half of the rent was payable on the 20th December, and the other on the 20th June, for the crop preceding.

Low assigned the lease to Alexander Wilson, who again assigned it to Andrew Knowles; and he reaped the crop, and was liable for the rent of the year 1793.

On the 26th June 1794, Low applied to the Sheriff, to sequester Knowles' effects, for payment of the rents for crop 1793 and 1794; and on the same day he instituted an action against him on the act of federunt 1756; concluding, that he should be ordained to find caution for arrears, and the rent of the five subsequent crops; or to remove from the farm. Wilson, who had received a partial payment from Knowles, had previously become bankrupt.

Low paid the rent to the landlord for crop 1793 in July 1794.

The sequestration, which was at first granted by the Sheriff, was recalled, on Knowles finding caution for the rents for 1793 and 1794. But the other action was afterwards insisted in; and decree of removing was ultimately pronounced by the Sheriff in February 1795; by which time Low had recovered payment of the rent for crop 1793 from the cautioner in the sequestration, from whom, likewise, in October 1795, he got the rent for crop 1794.

In an advocacy, besides an argument on the whole circumstances of the case, two general questions occurred: 1^{mo}, How far, where a lease is granted to assignees, the original tenant, after assignation, continues liable to the landlord for the rent, and consequently has any title to insist in a removing against the assignees? And,

2^{do},

2do, Whether payment of arrears before decree, does not render further procedure on the act of federunt incompetent?

The Court considered the first question to be attended with difficulty, and one upon which there was no precedent; the opinions of Lord Bankton, b. 2. t. 9. § 14.; and Mr Erskine, b. 2. t. 6. § 34. (it was observed) who think the cedent still liable, being founded entirely on an observation incidentally made by the Court, in the case Grant against Lord Braco, reported by Kilkerran, p. 532, *voce* Tack, which was decided on other grounds.

The Court, however, had no occasion in this case to determine the point.

On the second question, the pursuer contended, that the act of federunt gives the heritor, "or other setter of the tack," upon the tenant's becoming a year's rent in arrear, a right to insist that he shall find security for arrears, and five subsequent crops, in general terms, without making any exception in his favour, on his afterwards paying the arrears; and that the contrary doctrine would destroy the effect of the act of federunt, as a bankrupt tenant might contrive to make a partial payment, although he could not find security for his future punctuality, which was the chief object of the act of federunt.

The defender answered, That the penal consequences of the act of federunt could not be meant to apply irrevocably, wherever the term of payment was a few days perhaps elapsed; and that therefore the caution found in the sequestration, and still more the payments made by the cautioner, prevented their operation in this case.

The Lord Ordinary found, that the act of federunt applied, in respect "that at the commencement of the process a full year's rent was resting unpaid by the defender."

Upon advising a reclaiming petition, with answers, the Court were of opinion, that to found a removing under the act of federunt, the year's rent must be due likewise when the decree is pronounced; Select Decisions, No. 211.; but it was at the same time observed, that the landlord is not obliged to accept of partial payments.

The Lords, (11th March 1796), affoizied the defender; and to this judgment, upon considering a second petition, with answers, they almost unanimously "adhered."

Lord Ordinary, *E/sgrove*. A&C. *John Clerk, Ar. Campbell junior*. Alt. *Baird*.
Clerk, *Gordon*.

D. D.

N^o CCXXX.

N^o CCXXX.

July 5. 1796.

WILLIAM SCOTT, Procurator-Fiscal of the County of Mid-Lothian,

A G A I N S T

WILLIAM SMITH, and Others, Chaise-hirers in Edinburgh.

JURISDICTION.—*Have the Justices of Peace power to regulate the rates of hire for posting?*

THE Justices of Peace for Mid-Lothian, in 1760 and 1761, had fixed the hire for a chaise and two horses, travelling post, at 9d. *per* mile, at which rate it continued till October 1795, when William Smith and others, chaise-hirers in Edinburgh, notified, by advertisement in the newspapers, that on account of the great rise in the price of horses, oats, and other articles connected with their trade, they meant in future to charge 1s. *per* mile, exclusive of the King's duty.

Upon this William Scott, Procurator-fiscal for the county, presented a complaint to the Justices, praying that the postmasters should be prohibited from making any addition to their fares without their authority.

The defenders, in answer to the petition, contended, that the matter did not fall within the jurisdiction of the Court.

The Justices, 28th October 1795, found “ it proven by the admission of the defenders, that the combination complained of, and the increasing of the fares for posting, by their own authority, and publishing the same in the Edinburgh newspapers, was illegal and unwarrantable, and in contempt of the authority of the Court; therefore prohibited and discharged the said defenders, and all others concerned within this county, from exacting a higher rate of fares than those which were in use to be exacted previous to the attempt made by them in spring 1793, until otherwise ordered by the Justices; and that under the penalty of twenty shillings Sterling for each transgression: And the meeting further appointed the Justices present a committee, any three a quorum, to meet at such times and places as they shall think fit, to take into consideration the regulations of the Justices of the Peace now existing, relative to the fares exigible by the postmasters, with power to receive such propositions as the postmasters shall think proper to lay before them, ” and

“ and to report the whole to the next, or any subsequent meeting of the Quarter Sessions.”

The defenders having accordingly applied for permission to increase their fare, the Justices, after hearing parties, “ Refused the postmasters application for a rise in their fares for posting, adhered to the judgment pronounced on the 28th October last, and continued the interdict thereby granted.”

The defenders complained of these judgments by a bill of advocacy, in which they stated both the grounds on which they thought an increase of their fare reasonable, and also the argument in law from which they inferred that the Justices had no control over them.

On this last point the postmasters

Pleaded: The jurisdiction vested in Justices of the Peace is entirely statutable; 1609, c. 7.; and there is no statute which gives them a power to regulate the rates of posting. The only statutes which can possibly be supposed to have done so, are 1617, c. 8.; 1633, c. 25.; 1661, c. 38.; and 1669, c. 16. But the act 1617, c. 8. only empowers them to fix the “ wages of labourers, workmen and servants,” and “ to set a price upon craftsmens work;” the 1633, c. 25. is nothing more than a ratification of the former; and although the words used in 1661, c. 38. are somewhat different from those in the act 1617, it gives them no broader jurisdiction than what is conferred by this last statute. The act 1669, c. 16. again gives them no other power, except that of regulating “ all things concerning ferries;” a circumstance which strongly confirms the plea of the defenders, as it shews that it required an express statute to enable the Justices to interfere as to the fares to be paid by passengers on water; and therefore, had it been meant to extend their powers to the regulation of those payable by travellers at land, it would have contained a special clause to that purpose.

In England, from which we borrowed the institution of Justices of the Peace, they have no such jurisdiction as is here claimed; *Burn voce Servants*, art. 19.; *Blackstone*, vol. i. p. 428. *King v. Kelling*; *M. 3. G. Mod. Reports*, p. 140, *King v. Gately*.

Indeed there would have been no expediency in giving the Justices this power, as the competition which naturally arises in such cases will, in general, sufficiently secure the public against unreasonable demands. And should there even be a few instances, where, from peculiar circumstances, a chaise-hirer may be enabled to exact an exorbitant price, *e. g.* a stage where there is only one inn, the offender may be prosecuted at common law for extortion.

Answered: It is impossible that any Scots statute should, *in terminis*, empower Justices of the Peace to fix the rate to be paid for post-chaises; because before the Union they were unknown in this country. But it is obvious, from the act 1669, c. 16. that the Legislature meant to empower Justices of the Peace to prevent imposition on travellers; and accordingly, it appears from the proceedings

ceedings of the Justices of Mid-Lothian, in 1760 and 1761, that they have been in use to regulate the rates of posting.

Neither does it follow, from the Justices of Peace in England not having this power, that it should not fall under the province of those in Scotland. It is nearly two centuries since they were appointed in this country; and as all jurisdictions may here be extended by usage, they may have acquired, during that period, many powers not possessed by their brethren in England.

And however just the doctrine may be in most cases, that the price of commodities will find their own level, it will not hold with regard to posting. A traveller, in general, wants the time, and frequently the opportunity, necessary for making a fair bargain. The defenders, by allowing that a chaise-hirer is punishable for extortion, in truth concede, that he stands in a predicament different from other tradesmen. A shopkeeper, for instance, may refuse to sell his goods at any price, or he may charge twenty times their value, without committing a wrong which the law can take hold of. But a chaise-hirer must give his horses and chaise to the first comer, and that too at a reasonable rate. The business of posting, therefore, as a matter of police, falls, by established custom, to be regulated by the Justices of Peace.

A majority of the Court were for sustaining the jurisdiction of the Justices, on the grounds stated for the Procurator-fiscal.

Several Judges, however, delivered an opposite opinion. The Justices, (it was observed), derive all their powers from statute; and it is admitted, that there is none from which it can be positively inferred, that the regulation of posting makes part of their jurisdiction;—a circumstance which is much to be regretted, and which ought to be remedied by an act of Parliament.

The Court, (15th January 1796), by the narrowest majority, instructed the Lord Ordinary to refuse the bill as to the competency of the Justices of Peace; but to pass the bill, to the effect of trying the question as to the amount of the fares for posting, the complainers being, in the mean time, at liberty to charge 1 s. 2 d. *per* mile, duty included.

On advising a reclaiming petition, with answers, the Court “adhered.”

Lord Ordinary, *Swinton*. For the Procurator-fiscal, *Lord Advocate Dundas, Tait, Hope, James Clerk, James Gordon*. *Alt. H. Erskine, Cathcart*. Clerk, *Menzies*.

R. D.

N° CCXXXL

N^o CCXXXI.

July 7. 1796.

ELIZABETH MILLIE and Husband,

A G A I N S T

W A L T E R F E R G U S.

ARBITRATION.—*One of two arbiters can neither be compelled to decide, nor to name an umpire.*

WALTER FERGUS, along with another arbiter, accepted of a submission, to which Elizabeth White and her husband were parties. Mr Fergus, (who was the arbiter appointed by the other party), finding that the matter in dispute turned upon points of law, of which he was not qualified to judge, declined proceeding in the submission.

On this Elizabeth White and her husband brought an action against him, concluding, that he should be compelled to concur with the other arbiter, either in pronouncing an award, or in choosing an umpire.

In defence, Mr Fergus

Pleaded: An arbiter, like a mandatary, may resign his office at pleasure, provided he does so neither *dolo*se nor unseasonably. At least it is far from being clear, either in the Roman law or our own, that even a sole arbiter can, in any case, be compelled to give judgment; *l. 48. de recept qui, &c. (ff. lib. 4. tit. 8.)*; Ersk. b. 4. tit. 3. § 30.; Fount. 30th June 1699. Cheisly; and certainly he is not obliged to do so, where, as in this case, he can show a good cause for giving up the submission; *l. 15. and 16. de recept qui*; Gothofred. *ad leg. 16. b. t.*

But at all events, it is plain, that where there are two arbiters, they can be under no obligation either to decide or to name an umpire; because it may be impossible for them to agree in the one case on the sentence, and in the other on the person.

Answered: An arbiter, like a tutor, after accepting, cannot resign the office, either by the law of Rome or of this country, without stating a sufficient reason for doing so; *l. 3. § 1. de rec. qui*; Voet, *ad b. t. § 14.*; Sir George Mackenzie, b. 4. tit. 3. § 8.; Bankton, b. 4. tit. 45. § 132.; Fount 4th December 1702, Bruce; 8th February

February 1704, Cairncross, stated in Dictionary, Vol. i. p. 49.; Fount. 6th July 1708, Skeen; but the cause assigned by the defender is not relevant; because, although the matters at issue turn upon points of law, the arbiters may concur in making choice of a lawyer for their umpire. And before the defender is entitled to argue, that he and the other arbiter may not be able to fix on the same person, he must at least name one who would be agreeable to himself. It will be time enough to inquire what is next to be done, when his colleague refuses to adopt his choice.

The Court, without entering into the question how far a sole arbiter is bound to decide, were clear on the grounds stated by the defender, that against one of two arbiters the conclusions of the action were ill-founded.

The Lords unanimously assailed the defender.

Lord Ordinary, Swinton. Aft. H. Erskine, D. Cathcart. Aft. Solicitor-General Blair, Davidson. Clerk, Pringle.

R. D.

APPENDIX.

(N^o 1.)

18th March and 23d December 1793.

(COURT OF JUSTICIARY.)

HIS MAJESTY'S ADVOCATE,

AGAINST

ALEXANDER BROWN and JOHN MACNAB.

PENAL STATUTE, 26 Geo. III. c. 51.—*Strict interpretation of penal statutes.*

FALSEHOOD AND FORGERY.—*Falsehood and forgery in revenue-matters may be punished at common law, even though the thing counterfeited be liable to legal objections.*

BY sect. 2. of the statute 26 Geo. III. c. 51. relating to the duties on starch, the manufacturers are directed to paper each piece of starch, and to tie it with strings, crossing each other on that side of the piece where the ends of the paper are folded, and to affix with warm glue, on each piece of starch so papered and tied, a label or thin piece of paper, of certain dimensions, and of a different colour from the paper inclosing the starch, and this on that side of the piece where the ends of the paper are folded, so as to prevent the opening of the piece, without tearing the label. All these things are directed to be done in presence of the revenue-officer, who "shall cause every piece of starch, so papered as aforesaid, to be stamped or sealed upon each label or thin piece of paper aforesaid, with such stamp or seal as shall be provided by the Commissioners, for the duties on starch in England and Scotland respectively for that purpose, before any such piece of starch shall be put into the stove to dry."

By sect. 4. the Commissioners are authorised to provide and distribute stamps or seals for the above purpose, and to vary and alter them at pleasure; and the officers are directed in using them,

(A)

to

to do as little damage as possible to the starch, or paper inclosing it.

By sect. 13. all starch not so stamped is declared liable to seizure, and penalties are inflicted on the manufacturer or dealer in whose possession it is found.

And by sect. 14. it is declared, that if any person shall forge or counterfeit any stamp or seal which shall be provided in pursuance of this act, "for stamping or sealing starch made and papered in Great Britain, or shall counterfeit and resemble the impressions of the same, upon the papers containing starch, thereby to defraud his Majesty, &c. of the duties upon starch," he shall, upon conviction in due form of law, "be adjudged a felon, and shall suffer death, as in cases of felony, without benefit of clergy."

Upon the passing of this act, the Commissioners of Excise in Scotland distributed to the proper officers hand stamps for stamping the labels after they were affixed to the pieces of starch, when duly papered and tied, in terms of the statute.

These, however, after they had been used for some time, having been found inconvenient, by reason of the indistinctness of the marks impressed, and the consequent facility of imitation, were laid aside, and the Commissioners caused an engraving to be executed on copperplate, from which impressions were taken on a thin paper, and distributed to the revenue-officers, who, at sight of the trader, affixed them as labels on the starch, papered and tied, as above mentioned.

This alteration in the practice was acquiesced in by all the starchmakers, from 1787 to the end of 1792, when Alexander Brown, starchmaker at Monkton, and John Macnab his overseer, were brought to trial on a charge of counterfeiting the copperplate and impressions employed by the Commissioners. The indictment in the major proposition states, that "albeit, by the laws of this realm, as well by the common law as by the statute-law thereof, and by the laws of every other well governed realm, falsehood and forgery, or the being art and part thereof, particularly the forging or counterfeiting any mark, stamp, or seal appointed to be used for marking, stamping, or sealing any goods or manufactures, in order to secure and ascertain the payment of the duties granted to us, and charged or imposed on such goods or manufactures, or the using any such false or counterfeited mark, stamp or seal, knowing the same to be false and counterfeited, in defraud of us and the public revenue, or the counterfeiting or resembling the impressions of any such mark, stamp or seal, upon such goods and manufactures, or the papers, pieces or packages containing the same, or upon the label affixed or pasted on such papers, pieces or packages, contrary to law, and in order to defraud us and the public revenue of the duties imposed by law upon such goods and manufactures, are all and each of them crimes of an heinous nature, and severely punishable, and more particularly, by an act passed in the 26th year of our reign." The 14th section of the act is then inserted.

The minor proposition charges the pannels as guilty of one or other of these crimes. "In so far as the Commissioners of Excise for Scotland, as Commissioners for the duties on starch in Scotland, having, in pursuance of the powers vested in them by law, and particularly by the above mentioned statute, directed certain stamps for starch, to be engraved upon copperplates," &c. A description of the mode in which the offence was supposed to have been committed is then given, and the libel concludes: "At least, times and places libelled, the stamps provided by the Commissioners were counterfeited," &c. by the pannels.

Various objections having been stated to the relevancy of the indictment, informations and additional informations were ordered, in which the pannels

Pleaded: 1st, The distinction between simple felonies and those without benefit of clergy, between felonies and other crimes, is unknown in the law of Scotland. The 14th section of the act, therefore, which employs exclusively the technical language, and refers to the judicial proceedings of the law of England, must have been intended to apply only to that country. Several revenue-statutes have been passed since the Union, which evidently do not extend to Scotland; and in these the same language has been employed as in the present; 4 Geo. I. c. 11.; 6 Geo. I. c. 23.; 8 Geo. II. c. 18.; 9 Geo. II. c. 35.; 11 Geo. II. c. 26.; 14 Geo. II. c. 40. § 28. Whereas in others, which were meant to apply to both kingdoms, it is declared, that offenders in England shall be punished as felons, and those in Scotland be prosecuted before the criminal courts of that country, and suffer a capital punishment; 19 Geo. II. c. 34.; 24 Geo. III. c. 47.

2^{do}, To authorise a conviction upon a penal statute, the offence must come under the letter as well as the spirit of the law, and no argument from analogy or expediency can warrant its extension to other cases.

The words stamp or seal, whether as denoting the instrument with which an impression is made, or the impression itself, are clearly distinguished in common language from an engraving on copperplate, or an impression taken from it by means of machinery.

The mode in which the operation of stamping is to be performed, as pointed out by the statute, is quite inconsistent with the practice adopted by the Commissioners; see 26 Geo. III. c. 43. Accordingly hand stamps have always been provided by the Commissioners in England.

3^{tio}, The facts charged do not warrant a criminal prosecution at common law. The present indictment is irrelevant, because the pannels are charged with counterfeiting the copperplates, and the impressions thereof furnished by the Commissioners, "in pursuance of the powers vested in them by law." Whereas the Commissioners exceeded their powers, and the starch, with the copperplate

copperplate impressions on it, might have been seized as not having the stamps required by the statute.

Besides, the common law only reaches such offences against the revenue as are attended with a breach of the peace, or an injury to an individual; 16th July 1716, John Roy and Alexander Ramsay; 1729, Porteous.

The public revenue is the creature of statute, and frauds against it, as occasioning less injury to the offended party, and inferring less turpitude in the offender, are viewed in a different light from frauds against individuals. Hence the Legislature has taken care to affix pecuniary penalties and forfeitures to each transgression, and to ascertain the particular punishment to be inflicted in those cases, where a criminal prosecution was at all thought necessary. In some cases, where prior statutes had punished offenders with pecuniary penalties, (13 and 14 Charles II. c. 11. § 8.; 7 and 8 William and Mary, c. 22. § 10.), the Legislature has afterwards thought it necessary to subject them to a criminal prosecution; 29 Geo. II. c. 23. § 14.; see also 24 Geo. II. c. 41. § 12.; 32 Geo. III. c. 7. § 9. 23. c. 70. In others, the statute originally prohibiting the offence, has expressly introduced the same punishment which, had the same offence been directed against an individual, common law would have inflicted; 9 and 10 William III. c. 25. § 59.; 12 Anne, stat. 2. c. 9. § 13.; 13 Geo. III. c. 56. Now, from all these statutes, it may be inferred that, with regard to offences of this description, no prosecution is competent at common law.

4to, The crime of falsehood is defined to be the fraudulent suppression or imitation of truth; Mackenzie Crim. tit. 27.; Erskine, Book iv. tit. 4. § 66. But, in the eye of law, nothing is *true* which is not *legal*. The copperplate engravings provided by the Commissioners of Excise, and the impressions taken from them, having no legal existence, the pannels had as good a right to use them as the Commissioners of the Revenue, and cannot be guilty of the crime of falsehood, by so doing.

Answered: 1mo, By the 18th article of the Union, it was provided that both countries should have the same revenue-laws.

If the statute had merely declared that offenders should suffer death, its meaning would have been sufficiently explicit by the law of Scotland. But the addition of the words, "as in cases of felony, without benefit of clergy," was necessary to make it so by the law of England. They were added, however, not to regulate the mode of prosecution, but to ascertain the punishment to be inflicted on conviction.

In various revenue-laws where the jurisdiction of the Court of Justiciary is expressly recognised, the offence committed is denominated a felony; 9 Geo. II. c. 35. § 38.; 19 Geo. II. c. 34. § 12. And the following statutes, which are conceived in similar terms with the present, have always been understood to apply to Scotland; 9 Anne, c. 11. § 44. c. 23. § 34.; 10 Anne, c. 19. § 97.; 29 Geo. II. c. 12. § 21. c. 13. § 5.; 30 Geo. II. c. 19. § 27.; 31 Geo. II. c. 32. § 15.; 7 Geo. III. c. 43. § 18.; 14. c. 72. § 8.; 16. c. 34. § 15.; 19. c. 66. § 8.; 21. c. 56. § 9.; 23. c. 70. § 9.

It would be singular that a statute should make the same acts criminal in both countries, and yet make them the subject of prosecution only in one of them.

2^{do}, Penal statutes must receive, though a strict, yet a fair construction. The object of the act in question was merely that a mark should be affixed to each parcel of starch, demonstrative of its having paid the duty; and if this purpose is accomplished, it does not signify by whom, in what manner, or by what instrument the operation is performed.

Besides, the impression made by an engraving on a copperplate, is in familiar language called a stamp. If therefore the machine for making the impression had been placed at the manufactory, and each parcel of starch had been marked with it after it was labelled, the statute would clearly have applied; and if the manufacturer had complained that his starch was injured in this way, he might have required the officer to make the impression on the label before it was affixed. The Commissioners have done nothing more; and as they have power to vary the stamps or seals at pleasure, they may also vary the mode of conducting the operation.

3^{tio}, Even admitting that the Commissioners have exceeded their powers, the libel as laid is relevant at common law, because falsehood and forgery being charged generally both in the first part of the major proposition and in the conclusion, the description of the offence given in the other parts of the indictment cannot restrict it.

Although it were true that a mere fraud against the revenue cannot be the subject of a criminal prosecution, yet wherever, as in the present case, that fraud has been committed by the intervention of a crime known at common law, the offender is liable to prosecution; as, for instance, in the case of a smuggler, who beats or bribes a revenue-officer, or is guilty of perjury.

Neither does a statutable penalty supersede the punishment formerly competent at common law; 5th February 1754, Jollie; 1st July 1754, Mackirdie and Hamilton; 24th July 1786, Simson and Brown; 1st December 1788, Caithness and Bisset. Spring Circuit-court at Glasgow 1788, James Kerr.—Late case of James Stein.—10th May 1733, John Macfarlane; 1762, John Newton. Burrow's Reports, vol. ii. p. 803. vol. iii. p. 1418.; 1. Salk. 45. Stephens against Watson.

4^{to}, The facts charged come under the generic crime of falsehood; Mackenzie, Crim. tit. 27. § 2. tit. 28. § 1.; Erskine, b. 4. tit. 4. § 66.; Reg. Maj. b. 4. c. 13.; 6th February 1716, James Auchterlonie. Spring circuit at Perth 1784, George Small; 11th August 1773, Peter and James Dows. The essence of the crime consists in the suppression or imitation of truth, with an intention to defraud, and may be committed, although the original was liable to objection, for example, in a bill of exchange executed on paper not stamped according to law; Worcester Lent-term 1783, King against Hawkeswood; Trinity-term 1788, Crosbie against Arkwright; Term. Reports, vol. ii. p. 609. So that it is at any rate unnecessary to enquire how far the conduct of the Commissioners was legal in this case.

(B)

Observed

Observed on the Bench: As the statute libelled on relates to the revenue, there is no doubt that it extends to Scotland. But it does not apply to this case. Pena statutes must be strictly interpreted. Although there is not much in the distinction between an impression made by an engraving on copperplate, and one made in any other way, it is clear that hand-stamps only were in the view of the Legislature, and that the impression was intended to be made after the label was affixed to the starch. The statutes give the Commissioners no discretionary power as to the mode of conducting the operation.

But laying the statute entirely out of the question, the facts charged warrant a prosecution at common law, on the head of falsehood and forgery, so as to infer an arbitrary punishment. Frauds against the revenue are highly pernicious in their consequences, and equally criminal with frauds against individuals, and when they are committed by means of a crime at common law, they are punishable in the same manner. The present indictment is clearly relevant, as it asserts that the Commissioners had authority independent of the statute. But to warrant a conviction at common law, it is sufficient that *de facto* they made a regulation, which was acquiesced in by the trade, and had the effect of protecting the goods from seizure. If some years ago, when the Commissioners of Excise, although they had no legal authority to do so, appointed the strength of spirits to be ascertained by a hydrometer, the distillers, instead of resisting the measure, had acquiesced in it, and had forged permits, bearing that such proof had been adhibited, they would have been liable to punishment at common law; and the same would be the case of a person who should forge, and operate payment of an usurious bond or bill liable to objections in law.

The Court unanimously found, that the statute libelled on extended to Scotland; that the fact charged in the minor proposition did not fall under it; but that the libel was relevant as laid on the common law.

The diet was then deserted *pro loco et tempore*, and a new indictment, founded solely on common law, was raised, which only differed from the former, in stating simply as a matter of fact, that the Commissioners had directed certain stamps to be engraved on copperplate, and impressions therefrom to be distributed, for the purposes of the act 26 Geo. III. c. 51. without stating under what authority they had proceeded.

This libel being likewise objected to, informations were ordered, and the Court, (on the 23d December 1793), upon the grounds already stated, unanimously found it relevant to infer the pains of law.

Upon this last indictment Brown was afterwards fugitated for non-appearance, and Macnab convicted and banished from Scotland for fourteen years.

For the Crown, *Lord Advocate Dundas, Solicitor-General Blair, John Anstruther.*

For the Pannels, *Dean of Faculty Erskine, Wight, Macconochie, D. Williamson.*

D. D.

(COURT

(COURT of JUSTICIARY.)

(N^o II.)

March 18. 1793.

His MAJESTY's ADVOCATE,

A G A I N S T

JAMES ROBERTSON and WALTER BERRY.

VERDICT.—*A punishment inflicted where the pannels were charged with wickedly and feloniously printing and publishing a seditious pamphlet; and the Jury found, "that one of the pannels had printed and published, and that the other had published only, the pamphlet libelled on."*

PUBLISHER—*responsible for what he publishes.*

JAMES ROBERTSON and WALTER BERRY were charged with having wickedly and feloniously printed and published a seditious pamphlet, entitled, "The Political Progress of Britain," &c. and containing, among others, certain seditious passages, which were inserted in the criminal letters.

The Court found the libel relevant to infer the pains of law.

The Jury found it proven, "That the said James Robertson did print and publish, and that the said Walter Berry did publish only the pamphlet libelled on."

The pannels contended, That no punishment could follow on this verdict; because it neither found that there was any thing seditious in the pamphlet, nor that they had acted with a wicked and felonious intention, both of which were essential ingredients in the crime charged against them.

Upon advising minutes of debate, it was

Observed on the Bench: The Jury might, if they pleased, have returned a general verdict of guilty or not guilty. For although, in trials for libel before the Courts of England, this has only of late, and by express statute been made the lawful privilege of juries, yet, in our practice, no distinction was ever understood to take place in that respect between cases of libel and any other, but the whole ingredients of the offence were always held to be remitted, as under the common rule, to the knowledge of the Assize. The jury here have however chosen to return a special verdict, wherein certain facts are found, leaving the inference in law

law which thence arises to be settled by the Court. Now, to ascertain the *nature* of the pamphlet, and the *character* in which it was viewed by the jury, recourse must be had to the criminal docters to these, and the account which is there given, the verdict plainly refers, when it finds them guilty of publishing this pamphlet, *as* qualified and characterised in the libel, and as containing the various passages which are there inserted at length. These passages, or rather the whole pamphlet itself, which contains them, are therefore to be held as engrossed in the verdict; and these passages the Court have already, by their interlocutor on the relevancy, found, and must still hold to be inflammatory and seditious. The jury, therefore, by this reference to the libel on which that judgment went, and which describes the composition as of a wicked and seditious kind, plainly acquiesce in and adopt that judgment and description; as, indeed, if they had not adopted them, it would then have lain on them to have declared their own opinion to the contrary, either by finding that this was an innocent pamphlet, or at least by a general verdict of acquittal.

With respect again to the intention of the pannels, it is not in any case essential that the jury find that the pannels acted from a criminal purpose; it is sufficient that they find facts from which in law and sound construction the Court are bound to infer it. The inference of guilt from the facts found against the pannels in the present case, is as easy and direct as from any other criminal or forbidden act, unless proof were offered in exculpation. A contrary opinion would be both dangerous in its consequences, and unreasonable in itself. The pannels must be supposed to be endowed with a common degree of capacity, to understand what others understand, and consequently to have viewed the work in question in the same light in which it has been viewed by a jury of their peers. Robertson both printed and published it, and cannot therefore be presumed to be ignorant of the contents, nor of the nature and tendency of a pamphlet which passed in detail through his hands. Nor is Berry, who only published it, less responsible. It was his duty to have perused and approved of it before publication, and to have satisfied himself that it contained nothing which was not innocent and wholesome. His neglecting to do so could only proceed from a criminal indifference to the interest of the public. Like the vender of drugs, he was bound to know the quality of what he exposed, and liable to punishment, if, instead of remedies, he dealt in poisons. It will not excuse him that he only published in the view of profit; for he is not to sport with the public safety by means of his trade; nor will it afford him any defence, that he could not estimate with certainty the precise extent of the operation of such a work; on the contrary, so much the more was he bound, for that very reason, to be cautious of what he published. Nay, it might even be held, that it would make no alteration in his favour, though the book were written in a language which he did not understand, since he ought to have submitted it to the inspection of persons skilled in that language,

guage, and capable to judge of the contents. Besides, in every case of libel, it is in reality the act of publication chiefly that constitutes the guilt, and to this we must resort, even for conviction of the printer; for, if he only print without publishing, he is no more guilty of a cognizable crime, than if one forge a writing, and keep it carefully locked up in his own possession. But in either case, if the thing be uttered, though by another person, this cannot ordinarily happen without the knowledge of the printer or fabricator, he will be held to have concurred.

At the same time, circumstances may be conceived, sufficient to elide the presumption against the publisher, and free him of any blame; but these it is his part to allege in exculpation, and to prove.

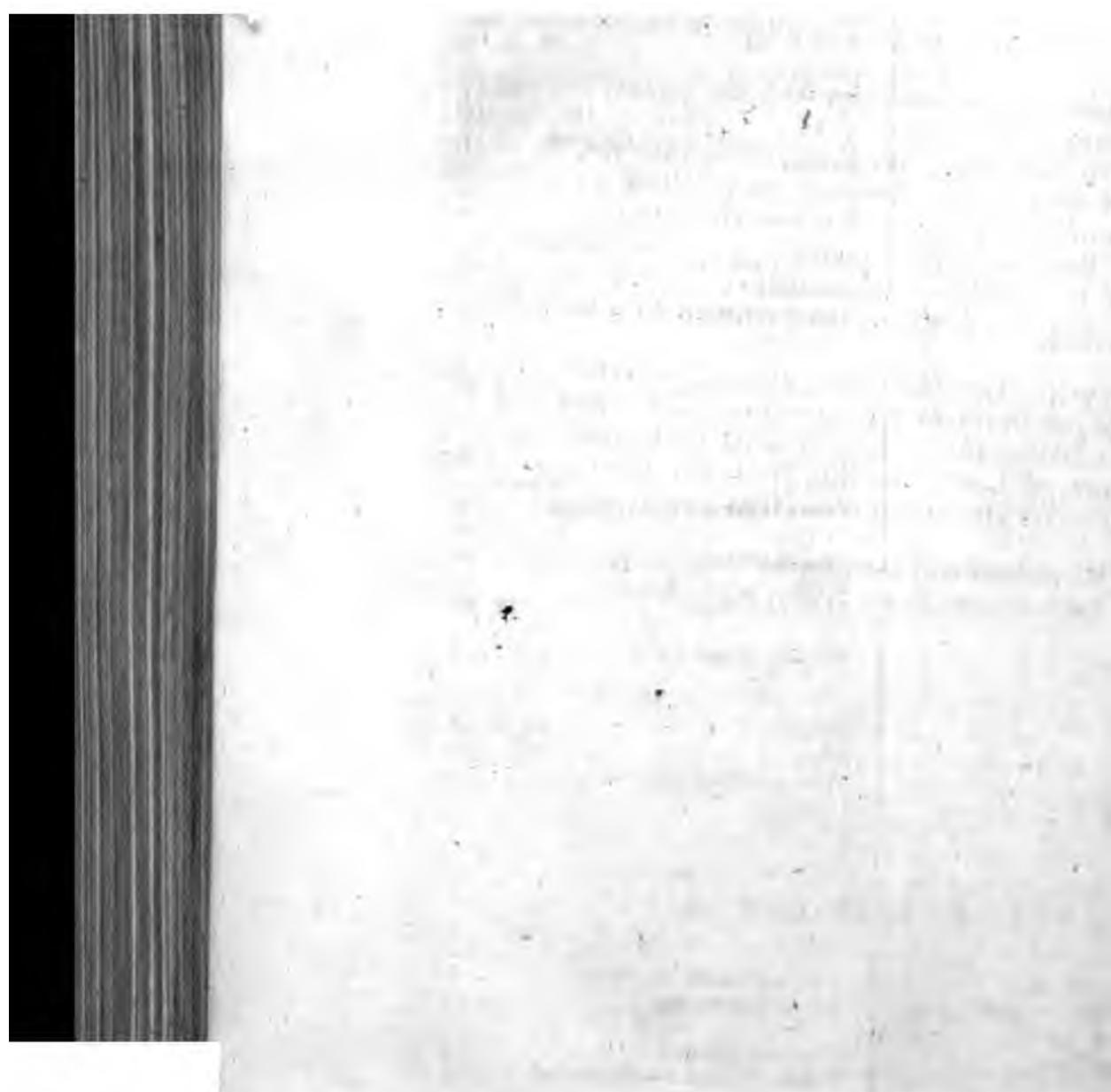
Two of the Judges who concurred with the others, (all the ordinary Judges were present), both as to the nature of the verdict, and its effect as to Robertson, had some doubts how far, in all the circumstances of the case, it warranted the inflicting a punishment on Berry. One of them would have concurred with the rest, if the jury had found Berry guilty of publishing, instead of finding it proven that he had published the pamphlet libelled on, and the other came in the end to be of the same opinion with his brethren.

The Lords repelled the objections offered in arrest of judgment, and adjudged Berry to be imprisoned for three and Robertson for six months, and thereafter until they should find caution to the extent of L. 100 Sterling each, for their good behaviour for three years after their liberation.

For the Prosecutor, *Crown Counsel.*

For the Pannels, *Dean of Faculty, Wight, Fletcher.*

D. D.



A P P E N D I X.

(N^o III.)

June 15. 1795.

COURT OF JUSTICIARY.

Sir WILLIAM JARDINE, with concurrence of his Majesty's
Advocate,

A G A I N S T

MAGDALENE BARBERIE De la MOTTE.

TITLE TO PURSUE.—*The crime of attempting to suborn witnesses to commit perjury, cannot be prosecuted at the instance of the party who would have been hurt, had the attempt been carried into effect.*

IN 1787, Sir William Jardine obtained a decree of divorce against his wife, Mrs Magdalene Barberie De la Motte.

Mrs De la Motte afterwards raised a criminal prosecution against Sir William for subornation of perjury; alleging that he had bribed some of the material witnesses to swear falsely against her in the process of divorce.

Sir William, on the other hand, sometime before the date of Mrs De la Motte's indictment, had, with the concurrence of the Lord Advocate, instituted a prosecution against her, charging her with the same crime, on account of her having, as he alleged, used menaces towards these witnesses, and given them promises of reward, with the view of getting them to swear, that they had formerly, in consequence of being bribed by him, given false evidence against her, while in fact they had on that occasion only told the truth.

Mrs De la Motte afterwards deserted the diet at her instance, *pro loco et tempore*; and in defence against the relevancy of the indictment brought by Sir William,

Pleaded:

Pleaded: Supposing it were true that the pannel had tampered with the witnesses, yet as they have never been brought forward to swear a second time, it is impossible she can be guilty of subornation of perjury; Hawkins pleas of the Crown, vol. i. p. 172. Blackstone, b. 4. c. 10. § 16. The charge against her amounts at most only to an attempt to commit that crime, by which attempt Sir William Jardine has not been injured, either in his person, property, or reputation. This prosecution, therefore, is only competent at the instance of the public prosecutor; popular actions being extremely dangerous, and indeed unknown in our law, except in a few instances, where they are allowed by special Statute; Spirit of the laws, b. 6. t. 8.; Kames Hist. Law Tracts, p. 60.; Maclaurin's Criminal Cases, No. 75, February 1767, Robb against Halladay; No. 79. November 1767, Mackintosh, &c. against Dempster; Hawkins Pleas of the Crown, p. 181, 182.

Answered: Although the pannel has not been able to carry her intentions into full effect, the law will hold the pursuer to have suffered in his character, by her malicious attempts to hold out that he obtained the divorce by subornation of perjury. See Maclaurin, No. 95. Haggart against Hogg; 2d July 1787, Penrose Cuming against Leslie. He has certainly a more immediate interest to prosecute than any other individual in the community; and unless it were competent to him, crimes of this sort would pass unpunished, for it is impossible the public prosecutor can watch over all the mal-practices committed in the course of law-suits between individuals.

The Court, after advising informations, and additional informations on the relevancy, "found, That the charge contained in the libel did not amount to the crime of subornation of perjury, but an attempt to commit such a crime: Found, That the private prosecutor has no interest or title to bring this prosecution against the pannel, upon the facts so charged, the said prosecution being only with concurrence, and not at all at the instance of his Majesty's Advocate; and therefore dismissed the said criminal libel, and the pannel from the bar."

A&. Lord Advocate Dundas, Dean of Faculty Erskine, Solicitor-General Blair. Geo. Fergusson. Alt. Cullen, Macleod Bannatyne, Rae.

R. D.

A P P E N D I X.

The two following decisions of the Court of Session were omitted in their proper place.

November 19. 1795.

The Duke of ARGYLE,

A G A I N S T

The Earl of DUNMORE.

SUPERIOR AND VASSAL.—*A superior having refused to grant a charter on an entail, unless it contained a clause acknowledging his right to a year's rent, whenever the substitute taking up the estate should not be heir-male or of line to the vassal last entered, the Court found him only entitled to have a reservation inserted in it, keeping the question open for discussion when the case should occur.*

THE trustees of the late Earl of Dunmore purchased certain lands of which the Duke of Argyle is superior, and entailed them on the family of Dunmore, and others, as directed by the deed under which they acted.

In a declarator of nonentry brought by the Duke of Argyle against the present Earl of Dunmore, the institute in the entail, the defender was willing to pay a year's rent for his entry as a singular successor; but the pursuer further insisted, that the charter should contain a declaration, that he should not be obliged to enter such of the substitutes as were not heirs-male or of line to the vassal last entered and infeft, without receiving a year's rent from them, as singular successors also.

The defender, while he objected to this clause, offered, that all the casualties of superiority should be reserved in the charter; and, in particular, that it should be declared in it, " That the said Duke, by granting this present charter, does not exclude himself or his heirs from any claim which he or they may have at law to a full year's rent of the lands herein contained, wherever the heirs of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered and infeft by the said Duke, and his forefairs."

D

The

The pursuer maintained, that until an entail is acknowledged by the superior, in questions with him, every substitute who is not heir of line to the last vassal is to be held a singular successor, and must pay a composition as such for his entry: That his being willing to put such of them as might be heirs-male of the last vassal in a different situation, was merely *ex gratia*, and from its being his wish to be equally indulgent to the defender as to his other vassals, to whom it had been the practice of his family to grant charters upon similar terms: And that it was necessary for the Court to determine the general question at present; because, after acknowledging an entail, by granting a charter upon it, although it contained the reservation proposed by the defender, the pursuer would be precluded from making his present claim, 10th July 1760, Lockhart against Denham.

Answered: It is imposing an unnecessary hardship on the defender, to oblige him to discuss a general question of law, the decision of which cannot affect the interest of himself, or of his descendants, who will fall to be entered as heirs, though the charter be made out in the terms proposed by the pursuer: The reservation offered leaves the point open for discussion, when a case occurs, where it becomes necessary to determine it; accordingly, in the case of Sir Hector Mackenzie of Gairloch in 1777*, the Court found, that a similar reservation was all that the superior was entitled to insist for.

The Lord Ordinary “found, That the Duke of Argyle is not entitled to insert in the charter to be granted to the Earl of Dunmore the reservation stated in the minute given in for him, and that the Earl of Dunmore is entitled to have a charter with the reservation stated in the minute given in for him.”

Upon advising a reclaiming petition and answers, it was

Observed: A clause reserving the question entire, when the case, that the substitute entitled to take up the estate is not heir of line to the person last in possession, shall occur, is all that the pursuer is legally entitled to demand. The case of Lockhart against Denham, in so far as the Court denied full effect to a similar reservation, was erroneously decided.

The Lords, “in respect the reservation proposed by the Earl of Dunmore leaves the question entire when it shall occur,” unanimously “adhered.”

Lord Ordinary, *Justice-Clerk.*
Clerk, *Home.*

Act. *Arch. Campbell junior.*

Alt. *Dav. Williamson.*

D. D.

December

* Not collected.

December 2. 1797.

THOMAS LAURIE, Collector of the Poor's Rates for the City of Glasgow,

AGAINST

ROBERT DREGHORN.

POOR.—*It is competent for the Magistrates of Glasgow to levy the poor's rates upon the inhabitants, according to the extent of their heritable property within the town, and of their personal property wherever situated.*

IN Glasgow, a committee from the Town-Council, and from the Merchants and Trades-Houses, have, by immemorial custom, been annually appointed by these bodies for superintending the maintenance of the poor. The first step taken by the committee, is to make an estimate of the sum necessary for this purpose during the year of their management. They afterwards appoint a certain number of the inhabitants, (commonly 15), who are neither members of the Town-Council, nor of the committee for the poor, as assessors, to proportion it, upon oath, among the inhabitants at large, according to the best judgment they can form of their fortunes, exclusive of heritable property situated without the town.

Robert Dreghorn resides chiefly in Glasgow, but is not engaged in trade. The assessors for 1793, rated the value of Mr Dreghorn's heritable subjects within the town, and of his personal property, wherever situated, at L. 24,000 Sterling, which made his share of the assessment for that year L. 19.

Mr Dreghorn refused to pay this sum, contending, that poor's rates can only be levied on stock in trade and heritable property within the town, which last he admitted he was possessed of to the amount of L. 300 Sterling yearly, and for which alone he was willing to pay.

In an action brought against him before the Magistrates, in name of the collector of the poor's rates, for his full assessment, they found, " That the Magistrates and Council of Glasgow, by whose
" authority the assessment in question has been ascertained, by
" means of sworn assessors appointed by them, for ascertaining each
" inhabitant

“ inhabitant of the city’s proportion, according to his estimated
 “ wealth, of this necessary public burden for the maintenance of
 “ the city’s poor, have title, by express statutes, to ascertain and
 “ levy the due proportions of such assessments; and in respect of
 “ said assessors apportionment of the sum of L. 19 on the defender
 “ Mr Dreghorn, and, *separatim*, as Mr Dreghorn has not denied that
 “ the extent of his fortune locally within the city, and of his per-
 “ sonal estate wherever situated, which are the legal measures of
 “ such public burdens, which last is not subject to such a burden
 “ without the city, are adequate to sustain his proportion of the said
 “ assessment, according to the same proportion imposed on the like
 “ estates of the other inhabitants, repelled the defences, and de-
 “ cerned for the sums libelled.”

The defender brought this judgment under review by advoca-
 tion; and

Pleaded: Assessments for the maintenance of the poor can only
 be imposed by statute, and there is none which authorises a tax for
 that purpose upon personal property.

It is true the act 1579, c. 74. gives power to the Magistrates of
 burghs, to stent the “ haill inhabitantes, according to the estima-
 “ tion of their substance;” but as few persons at its date were
 possessed of money or goods, except in the place of their resi-
 dence, it cannot be reasonably supposed that the Legislature meant
 by this expression to lay any imposition on personal property situa-
 ted elsewhere.

Besides, this statute was not enforced, and the act 1592, c. 155.
 expressly limited taxations within burgh, to those “ exerceaned
 “ merchandice, or having change within the same.”

No doubt this was altered by 1597, c. 279. so far as to make
 every person living within burgh, worth 2000 merks, or L. 1000 of
 yearly rent, liable along with the other inhabitants. It is clear,
 however, from its preamble, that the 2000 merks, or the L. 100,
 were to arise from property within the town; accordingly, the sub-
 sequent act 1597, c. 280, enacts, that the inhabitants shall only
 be stented in proportion “ to their rents and holdings within
 “ burgh.” See also Stair, 11th January 1678, Town of Aberdeen;
 Fount. vol. i. page 679. 688, Town-Council of Glasgow.

And there is an evident expediency in confining the application
 of the burden in this manner. The assessors may ascertain with
 tolerable precision the value of the heritable property, and stock
 in trade, belonging to each individual within burgh; but when
 they attempt to fix the amount of a man’s whole personal property,
 their computations must necessarily be liable to much uncertainty,
 an evil which can only be removed by a full disclosure of a man’s
 affairs, rather than make which, many mercantile people would
 submit to great oppression.

Answered: The act 1579, c. 74. so far from not having been en-
 forced, is expressly ratified by 1698, c. 21. and is at this day the
 fundamental

fundamental statute in regard to poor's rates within burgh; by it the tax for maintenance of the poor is appointed to be levied, according to the estimation of the *substance* of the contributors; a phrase which the common use of our language will not admit of being applied exclusively to heritable property. The defender, indeed, allows, that it reaches stock in trade, which certainly does not fall more directly under it than any other sort of personal property.

The statutes 1592, c. 155. and 1597, c. 180. have no relation to poor's rates, their object being solely to ascertain the persons in burghs liable in national taxes; and the statute 1597, c. 279. merely ascertains the description of persons to be assessed for the maintenance of the poor, but makes no alteration on the act 1579, c. 74. in so far as it relates to the kind of property according to which they are to contribute.

The alleged inexpediency of this mode of assessment, if at all well founded, applies more strongly to taxing mercantile stock, than personal fortune not employed in trade. A person, though engaged in great commercial concerns, may be worth nothing; but the extent of a man's fortune, when realised, is commonly pretty well known to his fellow-citizens. The danger of disclosing his affairs, too, is incomparably greater to the one than the other. Supposing, however, there were objections to this mode of taxation, it is surely better than allowing persons like the defender, with large personal fortunes, not employed in trade, to be almost wholly exempted from paying any share of the poor's-rates.

The Lord Ordinary "remitted the cause to the Magistrates, and found the defender liable in expences."

On advising a reclaiming petition, with answers, the Court thought the mode of assessment complained of was sanctioned both by the 1579, c. 74. and by immemorial usage. But it was at the same time observed, That although persons in the defender's situation should be obliged, in one shape or another, to contribute to the support of the poor, as nearly as possible in proportion to their fortunes, the rule adopted in Edinburgh, of making every person pay according to the rent of the house which he inhabits, is perhaps preferable, as affording a *datum* sufficiently accurate, and in no case liable to partiality.

The Lords unanimously adhered.

Lord Ordinary, Swinton. Aft. Lord Advocate Dundas, Arch. Campbell, Connell.
Aft. Solicitor-General Blair, Tait. Clerk, Sinclair.

E

R. D.

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A P P E N D I X.

ABSTRACT* OF THE JUDGMENTS

OF THE

HOUSE OF LORDS,

Pronounced prior to 1st May 1798, in the Cases contained in this Volume.

N^o XXII.

March 10. 1794.

The CREDITORS of James Stein,

AGAINST

NEWNHAM, EVERETT and Company.

ORDERED and *adjudged*, That the appeal be dismissed, and that the interlocutors complained of be affirmed.

N^o XLVII.

May 13. 1795.

The YORK-BUILDINGS COMPANY,

AGAINST

ALEXANDER MACKENZIE.

“ It is *ORDERED* and *adjudged* by the Lords Spiritual and
“ Temporal in Parliament assembled, That the several interlo-
“ cutors complained of in the appeal be, and the same are
“ hereby reversed ; and it is hereby declared, that the decreet of
“ sale, and the charter under the Great Seal, proceeding on the
“ said decreet of sale in favour of the defender, with the instru-
“ ment of seisin in his favour following thereupon, all which
“ are challenged by the summons in the process, ought to be set
“ aside and avoided, to such extent and degree, and in such man-
“ ner as is hereafter provided ; and the defender ought to refund
“ to the pursuers all the rents and profits which he hath received
“ out of the estate in question, and an adequate consideration for
“ the

* This abstract is, in general, taken from the manuscript abridgment of the judgment given on the Appeal Cases in the Advocates Library.

“ the enjoyment of such parts thereof as he occupied himself : But
 “ without prejudice to the title of the defender to reclaim all such
 “ sums of money as he hath paid for the original price of the
 “ estate in question ; and also for the permanent improvement of
 “ the same, with the interest thereof, to be computed from the
 “ times when the same were respectively advanced and paid,
 “ according to such rate as the Court of Session shall appoint ;
 “ and likewise without prejudice to the titles and interests of
 “ the lessees, and others who may have contracted with the de-
 “ fender *bona fide*, and before the dependence of the present pro-
 “ cess ; and also without prejudice to the title of the common
 “ creditors to have the value of the estates in question, and
 “ the amount of the intermediate produce thereof, applied in
 “ payment of their demands, as fully as the same might have
 “ been done, if the aforesaid decret and instrument following
 “ thereon had not passed, the expences incurred by the pursuers
 “ in recovering the same being first deducted : And it is fur-
 “ ther ordered, That an account be taken of the rents and pro-
 “ fits of the estates in question received by the defender, and
 “ of the yearly value of such parts thereof as have been in his
 “ occupation, and of all sums of money received by the defen-
 “ der for the sale of timber, stone, coal, or other parts of the in-
 “ heritance, and that interest be computed upon all such sums re-
 “ spectively, from the respective times of their being received, at
 “ such rate as the Court of Session, according to the course of
 “ that Court, shall think fit to order : And it is further ordered,
 “ That an account also be taken of the several sums of money
 “ which the defender hath actually paid as the original price of
 “ the said estates, and also of such further sums of money as the
 “ defender hath actually laid out for the permanent benefit and
 “ improvement of the said estates ; and that interest be compu-
 “ ted, at the above-mentioned rate, upon the said several sums
 “ from the times when the same were actually disbursed ; and that
 “ one of the said accounts be set against the other, and such rests
 “ be made in taking the same as justice may require ; and that
 “ either party do pay to the other such sum of money as shall be
 “ found due on the balance of the said accounts ; and if nothing
 “ shall be found due to the defender, or upon payment of what
 “ shall be so found due, that the defender do reconvey the said
 “ estates to the pursuers, subject to the demands of their creditors,
 “ and to the leases and other contracts, as aforesaid, in such man-
 “ ner as the the Court of Session shall think fit to direct : And it
 “ is also further ordered, That the cause be remitted back to the
 “ Court of Session in Scotland, and that the said Court do give all
 “ necessary and proper directions for carrying this judgment into
 “ execution.”

N^o LIII.*April 26. 1797.*

FRANCIS PINKERTON DRUMMOND,

A G A I N S T

WILLIAM ABERNETHY DRUMMOND.

ORDERED and *adjudged*, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

N^o LXXII.*November 11. 1796.*

DOUGLAS, HERON, and Company,

A G A I N S T

The TRUSTEES of Andrew Grant.

ORDERED and *adjudged*, That the several interlocutors complained of in the appeal be reversed, except as to so much of the interlocutor of 19th November 1793, as finds, that the time requisite to completing the prescription in question only began to run from the third or last day of grace, and therefore repel the plea of prescription; without prejudice to any claim which Douglas, Heron and Company may make for payment of the two bills out of the estate of Baron Grant, or out of such part thereof as have come to the hands of Andrew Grant, and for which he ought to have accounted in a suit for carrying into execution the trusts of the will of the said Andrew Grant.

N^o LXXXIV.*March 1. 1796.*

Sir JOHN OGILVIE and others,

A G A I N S T

CATHARINE MERCER and others.

ORDERED and *adjudged*, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

F

N^o CXXVIII.

N^o CXXVIII.

April 26. 1798.

JOHN NEWLANDS, and his Tutor *ad litem*,

A G A I N S T

The CREDITORS of John Newlands.

ORDERED and *adjudged*, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

N^o CXL.

February 23. 1797.

WILLIAM CURTIS,

A G A I N S T

EDWARD CHIPPENDALE.

ORDERED and *adjudged*, That the several interlocutors complained of be reversed; and it is further ordered, That the said cause be remitted back to the Court of Session in Scotland, to rank the appellants pursuant to their claim, to the amount of L. 25,801 : 4 : 10, and to proceed further in the cause, according to justice.

N^o CXLIX.

December 19. 1796.

CLAUDE SCOTT,

A G A I N S T

MACKENZIE and LINDSAY.

ORDERED and *adjudged*, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed with L. 100 costs.

(TEIND-COURT.)

N^o CLVI.

February 15. 1797.

WILLIAM FERGUSON,

A G A I N S T

JOHN GILLESPIE.

ORDERED and *adjudged*, That the original appeal * be dismissed, and that the interlocutors therein complained of be affirmed; and it

* Brought by Mr Ferguson.

it is further declared, that the appellant in the original appeal, do pay, or cause to be paid to the respondent in the said appeal L.150, for his costs in said appeal: And it is further *ordered* and *adjudged*, That the cross appeal be dismissed this House; and it is declared, that the said order of dismissal of the said cross appeal be without prejudice, it being unnecessary to enter into the matter of the same.

N^o CLXIX.

March 6. 1797.

The Earl of F I F E.

A G A I N S T

Mrs MARTHA MACKENZIE, and ELIZABETH FRAZER.

ORDERED and *adjudged*, That the original and cross appeals be dismissed, and that the interlocutors therein appealed from be affirmed.

N^o CCXXX.

January 8. 1798.

W I L L I A M S C O T T,

A G A I N S T

WILLIAM SMITH, and Others.

ORDERED and *adjudged*, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed *

* It is believed, that the appeal was dismissed entirely on the ground of the appellants having been guilty of an illegal combination to raise the price of posting, and that it was thought by the House of Peers, that, had it not been for this circumstance, the Justices of Peace would have had no jurisdiction in the matter.

I N D E X

OF THE

Names of the PURSUERS and DEFENDERS in the foregoing Decisions.

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sty's	Robertson and Berry, App.	2	Curtis and others	Home, Sir George	471 196
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ADJUDICATION. A declarator of expiry of the legal is necessary in order to cut off the right of reversion. No. 112. *James Campbell against John Scotland and Alexander Jack, March 7. 1794.*

Effect of a decree of declarator. *Ibid.*

An adjudication found to be null, which was led upon a decree for payment of the random sum of L. 10,000; although it reserved all objections *contra executionem*, no proof of the debt having been produced when the decree was obtained, and the sum really due having turned out to be only L. 800 : 10 : 7 $\frac{1}{2}$ currency of the island of St Christopher's. No. 113. *Creditors of Neil Macneil against James Saddler, Mar. 7. 1794.*

23 Geo. III. c. 18. § 5. Objection to the interest of a creditor who had been conjoined in a process of adjudication, that he had produced, as his grounds of debt, a copy of a bill, and notarial protest taken on it, but not the original bill itself, sustained, although all objections were reserved *contra executionem*. No. 125. *The Creditors of Alexander Hay against James Fleming, June 17. 1794.*

Where an adjudication has been obtained in security of such termly payments of an annuity as should afterwards become due, the arrears between the date of the decree and the death of the annuitant go to the heir. No. 127. *Thomas Ryder and his attorney, against the Creditors of Hugh Ross, July 1. 1794.*

When a summons of adjudication upon several distinct grounds of debt concludes, that the lands shall be adjudged for the same, as they shall be *jointly or separately* accumulated, and the Judge pronounces decree, in terms of the libel, the adjudication is not articulate, although the debts should be separately accumulated both in the grand decerniture and in the abbreviate of adjudication; and if there be a *pluris petitio* on one of the articles, the reverser will be restored against a decree declaring the expiry of the legal obtained in absence. No. 132. *David Landale against John Carmichael and others, Nov. 25 1794.*

1695, c. 24. The creditors of the ances-

tor are entitled to lead adjudications during the dependence of an action of sale, at the instance of the heir-apparent, where there is no immediate prospect of the estate being sold, and where the interest of the debts is not regularly paid. No. 197. *James Cheap and James Lindsay, against Donald Campbell and his father's Creditors, Jan. 29. 1796.*

A *pluris petitio* proceeding from culpable negligence found to void an adjudication *in toto*. No. 200. *Andrew Macubinnie, common agent for the Creditors of Alexander Hooks, against Alexander Burton, Feb. 4. 1796.*

ADVOCATION. An advocacy is competent where the libel concludes for more than L. 12 Sterling, although the sum awarded should be less. No. 157. *Robert Macintosh against Anne Maria Bennet and John B. Williamson, Feb. 14. 1795.*

ALIMENT. When the husband's estate is sequestrated, and he flies the country, leaving his wife behind him, her relations are not entitled, in competition with his creditors, to retain a part of her fortune remaining in their hands, either for her aliment during the lifetime of her husband, or for a suitable provision to her after his death. No. 188. *James Lee against the Executors of Robert Watson, Dec. 1. 1795.*

See CESSIO BONORUM.

See HUSBAND AND WIFE.

APPEAL. Deeds of settlement containing a nomination of executors, having been reduced by the Court of Session, the nearest in kin may get themselves confirmed during the dependence of an appeal against the decree of reduction, to the effect of vesting a title in themselves from the date of the confirmation in case the judgment should be affirmed. No. 15. *George Ross, and others, against Sarah Aglianby, January 22. 1793.*

In a competition arising in a multiple-poining between an arrestment on a depending action, in which the pursuer afterwards obtained decree, against which an appeal was in dependence, and two posterior arrestments, the one on a bill, and the other on a decree, the users of the two last found not entitled to a decree of preference over the funds arrested, which were ordered

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ed to remain *in medio* till the discussion of the appeal. No. 203. *Anne and Margaret Baynes, and their husbands, against Colonel Thomas Graham*, Feb. 16. 1796.

APPRENTICE. A person bred to the sea, who afterwards binds himself apprentice to a trade, may either be impressed or enter voluntarily into the service of the Royal Navy. No. 67. *James Turnbull and Malcolm Macdonald, against Sir George Home, Baronet*, June 26. 1793.

A matter found entitled to reclaim an apprentice not bred to the sea, who had entered a volunteer for the Navy, with the Commissioners appointed by 35th Geo. III. c. 9; but found not entitled to reclaim another, who had been at sea before the commencement of his apprenticeship. No. 196. *Cunningham and Simpson against Sir George Home, Baronet, and the Commissioners for raising Seamen at the Port of Leith*, January 19. 1796.

APPROBATE AND REPRUBATE. See **DEATH-BED**.

ARBITRATION. Arbiters cannot be examined, in order to explain the meaning of an ambiguous expression in their decree-arbitral. No. 100. *William Woddrop against John Finlay*, February 4. 1794.

A submission entered into by a quorum of tutors, "taking burden upon them for their pupila," falls by the death of one of the quorum. No. 215. *Lady Elisabeth Maitland and others, against the Representatives of William Mitchell and John Arnot*, May 18. 1796.

A submission entered into by the tutors of a female minor falls by her marriage, unless her husband become a party to it. *Ibid*.

One of two arbiters can neither be compelled to decide, nor to name an umpire. No. 231. *Elisabeth Millie and Husband against Walter Fergus*, July 7. 1796.

ARRESTMENT. A debt secured by an assignation to a lease of an heritable subject, followed with possession, cannot be carried by arrestment. No. 139. *Robert Watson against Alexander Macdonell*, Dec. 5. 1794.

When the rent of the current year is payable at Whitsunday and Martinmas, an arrestment before Whitsunday will only attach the rent payable at that term. No. 167. *Adam Livingston and others against George Farquhar Kinloch*, March 10. 1795.

When an heritable subject is vested in trustees for payment of legacies, the interest of the legatees may be attached by arrestment. No. 226. *Mrs Jean Douglas against John Mason*, June 29. 1796.

See **APPEAL**.

ASSIGNATION. How far an assignation to a sub-lease, in security of debt, intimated to the principal lessee, but on which no possession has followed, is a valid ground of preference in competition with personal creditors of the cedent? No. 122. *James*

Hardie Douglas and others, against the Trustee for the Creditors of Thomas Hay. June 6. 1794.

Is it sufficient to intimate an assignation to the confidential man of business of the debtor when he himself is abroad? No. 184. *Mrs Jane Ann Dougal, executrix of Dr Dougal, against John Gordon*, Nov. 17. 1795.

See **TACK**.

B

BANK. When a person grants a draught on his banker, payable to the bearer, or his order, on demand, he cannot, in a question with an onerous holder of it, plead compensation upon a debt due to him by the person to whom the draught was originally delivered. No. 89. *John Macgilebrist against Thomas Arthur*, Jan. 16. 1794.

BANKRUPT. Act 1696, c. 5. An heritable bond of relief granted to cautioners more than seven weeks after the date of the original obligation, and upon which infestment has not been taken till within sixty days of bankruptcy, falls under this statute. 1st No. 57. *Trustees for the Creditors of John Brough, against Alexander Duncan and James Jollie*, June 5. 1793.

Act 1696, c. 5. An heritable bond of relief, upon which an infestment had not been taken till within sixty days of bankruptcy, found to fall under that statute, although in implement of an obligation in writing, granted at the time the original debt was contracted. 2d No. 57. *Trustee for the Creditors of John Brough against George Spankie and James Jollie*, June 5. 1793.

Act 1621, c. 18. A bond of corroboration falls under its second clause. No. 61. *Creditors of Thomas Dunbar against Sir James Grant*, June 18. 1793.

33 Geo. III. c. 74. The interim factor is entitled to possession of the oaths of verity and mandates produced for the creditors at the general meeting at which he is appointed. No. 91. *Interim Factor on the Estate of Bertram, Gardner and Co. against David Thomson*, Jan. 16. 1794.

A person's purchasing goods within sixty days of the seller's bankruptcy, and afterwards getting bills granted by him to others, indorsed to himself for the purpose of compensating the price with them, found to be an illegal transaction. No. 95. *The Trustees on the sequestrated Estate of David Marshall, against James Provan and Company, and others*. Jan. 21. 1794.

Act 1696, c. 5. An heritable bond of relief granted by the principal debtor, and *bona fide* accepted by cautioners in a bond of corroboration of an old debt, does not fall under the act 1696, if both bonds be executed *unico contextu*, although infestment be not taken on the bond of relief till within 60 days of the principal debtor's bankruptcy.

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ruptcy. No. 144. *The Trustee on the sequestrated estate of Walter Monteath, against Colin Douglas and others*, Dec. 12. 1794.

A& 1696, c. 5. The discharge of a back-bond, qualifying an absolute disposition reduced upon the a& 1696. No. 182. *William Keith, trustee for the Creditors of John Sym against John Maxwell*, July 8. 1795.

A& 1621. An annuity granted by a husband to his wife after insolvency, and by a postnuptial contract of marriage, reduced in so far as it exceeded a reasonable provision. No. 198. *The Creditors of Walter Fergusson against Mrs Catharine Swinton*, Feb. 2. 1796.

See COMPENSATION RETENTION.

See RIGHT IN SECURITY.

See SOCIETY.

BASE INFESTMENT. A real right in security may be constituted by a base infestment, flowing from a person who is only superior in the lands. But such of the vassals as are in non-entry, are not obliged to pay the feu-duties to the creditor, till they are entered by the superior. No. 96. *Alexander Home against John Smith and others*, Jan. 22. 1794.

BASTARD. See PROOF.

BILL OF EXCHANGE. The holder of a bill in security for sums formerly advanced, or to whom a general balance is due, has the same privileges with a holder for value instantly paid. No. 30. *Messrs Percbard and Brock against James Brackenridge and others*, Feb. 20. 1793.

When a bill already accepted and indorsed is fraudulently altered from a smaller to a larger sum, in consequence of a blank being left in it, and is afterwards discounted, all the persons whose names are upon it are liable for the full sum which the discount *bona fide* paid for it. No. 62. *Alexander Pagan and James Hunter against Alexander Wyllie*, June 19. 1793.

A false description in *gremio* of a bill, of the value given for it, does not annul it. The presumption of law, that the acceptor has got value, can only be taken off by writ or oath of party. No. 79. *James and John Wallaces against James Barrie*, Nov. 29. 1793.

A bill having a receipt in general terms on the back of it, is presumed to have been paid by the acceptor. No. 80. *Andrew Fergusson against Robert Young*, Nov. 29. 1793.

Is a bill or promissory note granted as a reward for services and trouble effectual?—A gratuitous draught on a banker is valid. No. 86. *The Disponees of George Steel against David Wemyss*, Dec. 18. 1793.

When the debtor in a bill becomes a bankrupt, and a claim is made for it on his estate before the term of payment, the want of due negotiation cannot be objected by his creditors. No. 141. *William and John Harrisons against Edward Chippendale*,

Trustee on the sequestrated estate of Macalpine and Company, Dec. 9. 1794.

When a bill has passed through the hands of a person who is neither drawer, acceptor, nor indorser of it, no recourse lies against him, if it be afterwards dishonoured. *Ibid.*

When the sum in a bill is fraudulently increased, after it is accepted, by the addition of certain words not in the original document, and the alteration is apparent *ex facie*, action will not be sustained on it, even for its original amount; but when blanks are left in a bill at the time of accepting it, in consequence of which the drawer is afterwards enabled, by the addition of figures or words, to increase the sum, without giving the bill a suspicious appearance, the acceptor is liable to the onerous indorsee for its increased value. No. 152. *Archibald Grabame against William Gillespie and Company*, Jan. 27. 1795.

When a bill, payable a certain number of days after date, is protested for non-acceptance, the holder may raise summary diligence against the drawer for recourse, before the term of payment. No. 179. *James Cowan against William Key*, June 20. 1795.

Has a promissory-note payable by instalments the statutable privileges of bills? No. 206. *The Carron Company against Alexander Muirhead*, Feb. 25. 1796.

Action refused on a bill where the date appeared *ex facie* to have been altered, though it did not appear by whom, or for what purpose the alteration had been made. No. 228. *William Murcbie against John Macfarlane*, July 1. 1796.

BLANK WRIT. See BILL OF EXCHANGE.

BURGH OF BARONY, having a sufficient jail, is bound to maintain prisoners in it for crimes committed within the burgh, out of its own funds; but is entitled to relief from the rogue-money for the maintenance of persons confined in it for crimes committed in the other parts of the county. No. 13. *The Magistrates and Town-Council of Paisley, against the Freeholders and Commissioners of Supply of the county of Renfrew*, Jan. 17. 1793.

See JURISDICTION.

BURGH ROYAL. A corporation of tradesmen cannot employ its funds, or assess its members, for defraying the expence of supporting general plans of reform. No. 10. *John Findlay and others, against John Newbigging and others*, Jan. 15. 1793.

The same point. No. 11. *John Wilson and others, against James Scott and others*, Jan. 16. 1793.

The Magistrates and Town-council of Edinburgh have power to form and regulate societies of porters, chairmen, &c. within the city. No. 29. *William Muir and others, against William Macbean and others*, Feb. 19. 1793.

Disbanded

I N D E X.

Disbanded soldiers are not entitled to exercise a plurality of trades. No. 29.

Members of the Incorporated Trades are entitled to import the materials of their several trades, and to export the produce thereof; but they have no right to deal as merchants in the native commodities of England, nor to import from that country made goods of those kinds which they manufacture. No. 56. *The Incorporated Trades of Aberdeen, against the Magistrates, Council, and Guildry of said city, May 28. 1793.*

The daughter of a soldier, although married to a person not a member of the Guildry, may retail groceries within burgh. No. 192. *James Manson, Treasurer of the Guildry, and James Miller, Procurator-fiscal of the Dean-of-Guild Court of Perth, against James Macdonald, Dec. 16. 1795.*

24th Geo. III. fef. 2. c. 6. A trade carried on in name, and, as it was said, for behoof of the son of a discharged soldier, who was only twelve years of age, found to be an evasion of the exclusive privileges of the Corporation. No. 194. *The Corporation of Bakers at Haddington, against David Begbie, Jan. 15. 1796.*

See JURISDICTION.

C

CAUTIONER. A cautioner in a bond of Corroboration found only entitled to a proportional relief from the cautioners in the original bond. No. 3. *Walter Smiton against Patrick Millar and others, Nov. 15. 1792.*

Although a decree of an inferior court, fundamentally null, is turned into a libel, the cautioner in the suspension is not liberated. No. 59. *John Herbertson and Company, against James Rattray and others, June 12. 1793.*

A cautioner for a tutor in law found liable for debts due by the tutor himself to his pupils, payable in his own lifetime, but not for those which only became payable at his death. No. 94. *Robert and Allan-James Bogles, and their factor loco tutoris, against George Bogle and others, Jan. 17. 1794.*

See RIGHT IN SECURITY.

CASSIO BONORUM. A person imprisoned for damages and expences awarded in an action of defamation, found entitled to the benefit of a *cessio bonorum*,—and allowed to retain a part of her jointure for her aliment. No. 88. *Helen Douglas against her Creditors, Jan. 15. 1794.*

The pursuer of a *Cassio bonorum* allowed to retain a small annuity for his aliment, although the donor had not declared it alimentary. No. 99. *Robert Mackay against his Creditors, Jan. 25. 1794.*

CLAUSE. Meaning of the expression, *good and pious uses*. No. 12. *John Macauland and others, against James Montgomery and Magistrates of Glasgow, Jan. 16. 1793.*

A clause "in a postnuptial contract of marriage, by which a husband conveyed "to his wife the whole *moveable goods*, "gear, and effects, which shall belong to "him at the time of his decease, including "heirship-moveables, household-furniture, "outside and inside plenishing, silver-plate, "jewels and linens; and in general, *all* "moveable goods and effects, of whatever "kind and denomination," found not to convey *nomina debitorum*, nor bank-notes. No. 169. *The Earl of Fife against Mrs Martha Mackenzie and Elizabeth Fraser, May 14. 1795.* See Abstract of Appeal Cases.

See SUPERIOR AND VASSAL.

See TAILZIE.

COLLATION. An heir of entail who is one of the nearest in kin, and not the heir *alio-qui successurus*, is entitled to a share of the moveable succession without collating. No. 138. *Mrs Rae Crawford against Sir John Stewart and Mrs Stirling, Dec. 3. 1794.*

COMMISSARY COURT. See JURISDICTION.

COMMUNION ELEMENTS. The Court cannot award an allowance for them out of the stock. No. 28. *David Wilkie against heritors of the parish of Cult, Feb. 13. 1793.*

COMPENSATION. RETENTION. Two surviving and solvent partners of a dissolved company being sued for payment of a company-debt, at the instance of trustees for the creditors of a bankrupt to whom it was due, it is competent for one of the defenders to plead compensation to the full amount upon a private debt due to him by the bankrupt. No. 69. *Trustees for the Creditors of William Bogle against John Ballantyne, July 8. 1793.*

A person purchasing a subject for another, in consequence of a commission from him, and, with his consent, taking the rights to it in his own name, is entitled to retain it, in competition with the other creditors of his constituent, till he is relieved of all cautionary obligations which he has undertaken for him. No. 75. *Creditors of John Brough against James Jollie, Nov. 26. 1793.*

A joint owner of a ship has a claim of preference or retention on it, for money advanced by him on its account, to the other proprietors, above his own share. No. 92. *John Glas against the Trustees for the Creditors of Charles Hutton, Jan. 16. 1794.*

If the creditors of A, a bankrupt, claim on the bankrupt-estate of B, for the amount of certain bills accepted by him, in A's possession at his bankruptcy, is it competent for the creditors of B to plead retention against this claim, on account of B's having indorsed bills accepted by A, the holders of which last have drawn a dividend out of the estate of A, and are likewise claiming upon the estate of B? No. 140. *William Curtis and others, assignees under*

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under the commission of bankruptcy of Gibson and Johnson, against Edward Chippendale, trustee on the sequestrated estate of William Macalpine and Company, Dec. 9. 1794. See Abstract of Appeal Cases.

A and B granted accommodation-bills to each other nearly of the same value. A indorsed the bills accepted by B for value; but B retained in his own hands those granted by A. A and B having afterwards become bankrupt, the indorsee of B's bills ranked for payment of them, both upon his estate as acceptor, and upon A's as drawer; from the former they drew 10 s. in the pound, and from the latter 5 s. In this situation it was found, that B's creditors were entitled likewise to rank on A's estate for the bills granted by him to B, and that compensation or retention could not be pleaded by A's creditors against their doing so. No. 213. *Alexander Nairne, Trustee of Forster and Company, against Thomas Cranston, Trustee for Creditors of Laidlaw, May 13. 1796.*

The clerk of a company, which was insolvent, but not legally bankrupt, having sold their effects and put the price into the hands of a banker, in consequence of a previous concert with him, on an account in his own name, "for the creditors of the company," the banker was found entitled to retain, for a debt due to himself, such a portion of the fund *in medio* as would have fallen to his share, if it had been divided among the whole creditors of the company in proportion to the number of their debts; but the other creditors were preferred according to the priority of their diligences. No. 177. *Mansfield, Ramsay, and Company, and Baillie, Pocock and Company, against Smith, Wright, and Gray, June 17. 1795.*

A creditor holding a bond in consequence of an assignation from his debtor, *ex facie* absolute, is not obliged to reconvey it to the cedent, till he be repaid advances made by him to the latter, subsequent to the date of the assignation, although by a missive granted by him to the cedent of the same date with the assignation, he declared it to have been granted only in security of certain debts then due to him. No. 184. *Mrs Jean Ann Dougal, Executrix of Dr Dougal, against John Gordon, Nov. 17. 1795.*

See BANK.

See BANKRUPT.

See SOCIETY.

COMPETITION. If in consequence of the bankruptcy of purchasers or otherwise, after the subjects are sold, and the scheme of division is made up, but before the price is divided, the fund of payment be diminished, the loss falls entirely upon the postponed creditors. No. 77. *John Murray, and other preferable Creditors on the estate of John Rae, against David Blair, and*

others, his postponed Creditors, Nov. 27. 1793.

1695, c. 24. In a competition between a lease, and a disposition followed by infestment, both flowing from an heir apparent, neither party can object to the title of their common author. No. 110. *Francis Fraser against David Middleton, Feb. 26. 1794.*

An arrestment and an assignation ranked *pari passu*, where the execution of the former bore to have taken place between one and two, and the intimation of the latter between two and three of the afternoon of the same day. No. 226. *Mrs Jean Douglas against John Mason, June 29. 1796.*

See APPEAL.

See ASSIGNATION.

See KING.

See SOCIETY.

CONDICTIO INDEBITI—takes place where a party obtains a preference in a ranking to which he is not entitled, although he has got no more than payment of his debt. No. 1. *William Keith against Charles Grant, Richard Moleworth, and others, Nov. 14. 1792.*

CONDITIO SI SINE LIBERIS. See IMPLIED WILL.

CONFIRMATION. Must a charter of confirmation mention the deeds confirmed? No. 53. *Francis Pinkerton Drummond against William Abernethy Drummond, Mary Ogilvie, and her Husband, May 17. 1793. See Abstract of Appeal Cases.*

CONSIGNATION. Consignation in the hands of a clerk of Court may be proved by witnesses. No. 126. *The Trustee for the Creditors of Robert Rae against Alexander Gordon, June 21. 1794.*

D.

DEATHBED. A deed reduced as made on deathbed, where the granter survived its execution fifty-nine days and three hours. No. 84. *Sir J. Ogilvy and others against Catharine Mercer and others, Dec. 10. 1793.*

A disposition on death-bed found to exclude the heir at law where the granter, while in *liege pouffie*, had executed a former settlement in favour of a stranger, containing reserved powers to alter on deathbed. No. 185. *Mrs Elizabeth Crawford against Thomas Coutts, Nov. 17. 1795. See Abstract of Appeal cases.*

DEBTOR AND CREDITOR. A preferable catholic creditor may before the bankruptcy of his debtor renounce part of his security, without diminishing his right over the remaining subjects contained in it, although such renunciation should hurt the security of a secondary creditor obtained before its date. No. 68. *Messrs Edie and Laird, and others, against Rachel and Anne Robertsons, June 29. 1793.*

DELINQUENCY. See PROOF.

DIES INCEPTUS. See DEATHBED.

b

EXECUTION.

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E

EXECUTION. An arrestment used in the hands of a merchant found to be null, because it was executed by leaving a copy of it for him at his counting-room, which was apart from his dwelling-house, No. 148. *Frazer, Reid and Sons, and their trust-indorsees, against Lancaster and Jamieson, Jan. 14. 1795.*

EXHIBITION AD DELIBERANDUM. The right of the heir of line, or of former investitures, to bring an exhibition *ad deliberandum*, found to be cut off by an entail made by his predecessor, in favour of the heir-male. No. 154. *Sir Andrew Catbcart against the Earl of Cassillis, Feb. 4. 1795.*

F

FACTOR. See JURISDICTION.

FALSA DEMONSTRATIO. An erroneous description of the ground of debt for which an heritable bond of relief is granted, does not annul the security. No. 158. *The Daughters of Alexander Drummond against the Creditors of May Drummond, Feb. 17. 1795.*

FALSEHOOD AND FORGERY. Falsehood and forgery in revenue-matters may be punished at common law, even though the thing counterfeited be liable to legal objections. App. No. I. *His Majesty's Advocate against Alexander Brown and John Macnab, March 18. and Dec. 23. 1793.*

FIAR. When a subject is conveyed to trustees for a certain person in liferent, and his children *nascituri* in fee, the father is not fiar. No. 44. *Archibald Seton against the Creditors of Hugh Seton, March 6. 1793.*

Where heritable subjects are disposed to a father "*in liferent, for his liferent-use at lenarly*," and to his children *nascituris* in "fee," the fee cannot be attached for the debts of the father. No. 128. *John Newlands and his tutor ad litem, against the Creditors of John Newlands, July 9. 1794.* See Abstract of Appeal Cases.

A disposition of heritable property, granted by a father to his daughter and her husband, "their heirs, executors and assignees whatsoever," and proceeding upon the narrative of love and favour to his daughter, vests the fee in her. No. 189. *The Creditors of William Robertson against the Disponees of Janet Mason, Dec. 9. 1795.*

FORFEITURE. A lease of teinds forfeited by 20 Geo. II. c. 41. found to be annexed by 25 Geo. II. c. 41. and restored by 24 Geo. III. c. 57. No. 51. *Solicitor of Tithes against Kenneth Mackenzie, May 15. 1793.*

FOREIGN. A marriage having been celebrated in England, then the domicile of both parties, and having been dissolved by the death of the wife in Scotland, to which their domicile had, by that time, been removed, her executors were found to have no claim on the moveable effects of the husband, she having, by articles entered into before the

marriage, stipulated to herself a provision out of the fortune which her husband was to receive by her. No. 176. *Rebecca Hog against Thomas Hog, June 16. 1795.*

See FORUM COMPETENS.

See TESTAMENT.

FOREIGNER. An attorney *defending* in an action for a person abroad, is not liable personally for the expences awarded against his constituent. No. 8. *Amelia Leigh against James Rose, Dec. 19. 1792.*

FORUM COMPETENS. An English administrator having a domicile in Scotland, may be sued in the courts of this country. No. 72. *Douglas, Heron and Company, against the Trustees of Andrew Grant, Nov. 19. 1793.* See Abstract Appeal Cases.

An arrestment upon a summons of constitution, without a previous arrestment *jurisdictionis fundande gratia*, found to be a legal interest in a process of multiple-poinning already in dependence, for the distribution of moveable effects belonging to a foreigner. No. 177. *Mansfield, Ramsay and Company, and Baillie, Pocock and Company, against Smith, Wright and Gray, June 17. 1795.*

How far are the Commissaries competent in an action of divorce, where both the pursuer and defender reside in England, they being natives of Scotland, and domiciled there at the time of their marriage? No. 210. *Mary Pirie and her Attorney against Andrew Lunan, Mar. 8. 1796.*

G

GLEBE. When a minister is deprived of his manse and glebe, by a contract, which is saved from reduction by a prescriptive title, he is nevertheless entitled to a new designation. No. 24. *Minister of the Parish of Falkland against David Johnstone and others, Feb. 8. 1793.*

Temporal lands cannot be designed for a glebe in a parish in which there are church-lands, however distant they may be from the manse. No. 124. *The Minister of Kingsbarns against the Hon. Henry Erskine and others, June 10. 1794.*

GROUND AND WARRANTS.—Where a precept of seisin is assigned in a disposition granted by the Commissioners of the person in whose favour the charter containing the precept is conceived, a seisin taken upon it by the disponent is valid, although the commission under which the disposition was granted should neither be exhibited by his attorney to the Bailie, nor narrated in the instrument of seisin. No. 214. *Patrick Proctor against Sir David Carnegie, May 14. 1796.*

H

HEIR APPARENT. An heir apparent who declines entering, is bound to take a day to renounce, although he should be decerned executor *qua* nearest in kin to his ancestor. No. 9.

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No. 9. *James Begbie against Sir Charles Erskine*, Dec. 22. 1792.

An adjudication on the trust-bond of an heir apparent, granted for the purpose of making up a title, in order to reduce a disposition, is competent, although the disponent be infest. No. 71. *James and William Beveridge against Elisabeth Crawford and Thomas Coutts*, July 10. 1793.

Act 1695. c. 24. A person having for many years possessed in apparenacy, and having died without making up titles to an estate which was strictly entailed, but the entail of which was recorded only a few years before his death, upon an application from the substitutes of entail, his creditors, who had done no diligence against him, were found not entitled to attach the estate, although their debts were contracted before the entail was recorded. No. 168. *William Graham against the Creditors of Harry Graham*, May 13. 1795.

Notwithstanding the dependence of an action of reduction and declarator of irritancy brought against a proprietor and his heir-apparent, the latter, upon the death of the former, is entitled to continue the possession till decree is obtained. No. 212. *The Hon. Mrs Marianne Mackay and Col. William Fullerton, against Sir Hew Dalrymple and others*, March 9. 1796.

See ADJUDICATION.

See MEMBER OF PARLIAMENT.

HERITABLE AND MOVEABLE. When an adjudication is led on a moveable debt by a factor *loco tutoris*, the debt remains moveable as to succession. No. 20. *Mrs Elisabeth Ross against the Trustees of Hugh Ross*, Jan. 31. 1793.

A disposition of an heritable estate to trustees, for behoof of creditors, does not always render the moveable debts, even of those who accede, heritable. No. 60. *Mary Macewan against Janet Thomson*, June 18. 1793.

Although only a small part of the debt for which an adjudication is led should be made effectual by it, and although the greater part of the debt should afterwards be recovered from personal effects of the debtor situated in a foreign country, it renders the whole debt heritable as to succession. No. 116. *George Munro against James Alexander*, May 21. 1794.

Hay produced from seed sown along with barley and wheat in spring 1794, and cut down in summer 1795, found, in a competition between the heir and executor, to belong to the former. No. 201. *Mrs Annabella Wight and others, against William Inglis and others*, Feb. 10. 1796.

See ADJUDICATION.

See ARRESTMENT.

HEIRSHIP MOVEABLES. The heir has right only to a single horse, and having got an ox and a cow, he is not entitled to a bull.

No. 64. *David Hepburn against William Skirving*, June 19. 1793.

HUSBAND AND WIFE. Effect of a general renunciation of the *jus mariti*. Every thing in the wife's possession, except her *paraphernalia*, is presumed to belong to the husband, till the contrary is proved; even although a few years before he had obtained a decree of *Cessio bonorum*. No. 19. *Janet Macdonald and John Duff, her husband, for his interest, against David Doig*, Jan. 29. 1793.

A deed executed by a married woman, which is null for want of her husband's consent, does not become valid on being ratified by him after her death. No. 82. *Andrew Bullions against James Bayne and John Hepburn*, Dec. 4. 1793.

The wife of a bankrupt is not entitled to an aliment out of her own estate falling under her husband's *jus mariti*. No. 114. *Agnes Robb against the Trustee for her Husband's Creditors*, March 8. 1794.

When an entail fixes the *maximum* of the provision which an heir can give to his widow, and he dies without making any settlement on her, a greater sum cannot be awarded to her in name of aliment. No. 208. *Mrs Jean Gibson against Christian Kerr Reid*, March 1. 1796.

See ALIMENT.

See FOREIGN.

HYPOTHEC. An agent ordained to make exhibition to his client's creditors, of his title-deeds, on getting a decree of preference for his account, on the produce of the subjects, and a warrant for payment out of the first and readiest of the funds *in medio*. No. 25. *The Creditors of John Newlands against Andrew Mackenzie*, Feb. 9. 1793.

An agent's hypothec over the papers of his client, found not to extend to the proceedings in a process which he had been employed to conduct. No. 78. *Christian Callman against Hamilton Bell*, Nov. 28. 1793.

An agent, whose client's estate was sequestrated, ordained to deliver the bankrupt's papers to his creditors, on receiving a warrant for payment of his account out of the funds *in medio*, as soon as it should be adjusted. No. 91. *Interim Factor on estate of Bertram, Gardner and Company, against David Thomson*, Jan. 16. 1794.

See KING.

I.

IMPLIED CONDITION. A father having granted a provision to his son, and declared, that in case of his dying in minority, and without lawful children, he should be succeeded by his sisters, "*or such of them as should then be in life*;" and the son having died in minority, and unmarried, his nephew, by a sister predeceased, was found entitled to his mother's share. No. 104. *William and*

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*id Peter Roughheads against Marion Ran-
ie and others, Feb. 14. 1794.*

See LEGACY.

PLIED OBLIGATION. See TACK.

PLIED WILL. When an heir of entail, who has exercised a reserved faculty to its full extent, by granting a bond of provision to his younger children then existing, marries a second time, and has children by the second marriage, but dies before making any alteration on the former bond of provision, are the children of the second marriage entitled to a share of it? No. 63. *Margaret Oliphant and Husband against John Oliphant, June 19. 1793.*

How far two deeds making part of the same family-settlement, and executed, the one without and the other within the sixty days, affect one another, as *partes ejusdem negotii*. No. 84. *Sir John Ogilvy and others against Catherine Mercer and others, Dec. 10. 1793.* See Abstract of Appeal Cases.

Where an heir of entail has exercised a reserved faculty of burdening the estate in favour of younger children to its full extent, by granting a bond of provision to those in existence at its date, if he marry again, and die without making any alteration on the bond, a posthumous child is entitled to a share of it. No. 143. *Janet Oliphant against Margaret and Eleonora Oliphants, Dec. 10. 1794.*

INFESTMENT. A charter containing an erroneous destination, must be interpreted according to its warrant. No. 53. *Francis Pinkerton Drummond against William Abernethy Drummond, Mary Ogilvie and her husband, May 17. 1793.* See Abstract of Appeal Cases.

The right of the Crown-rentallers of Lochmaben may be transmitted by infestment. No. 153. *Irvine and Jopp, and their Attorneys, against John Collins, Feb. 4. 1795.*

INHIBITION. An inhibition against a person out of Scotland, is effectual against all his lands within the kingdom, if published at the market-cross of Edinburgh, and pier and shore of Leith. No. 21. *Henry Peirse and others, against Mrs Elizabeth Ross, Feb. 1. 1793.*

INNOVATION. Does the renewal of a bill operate as a *novatio debiti*? No. 184. *Mrs Jane Anne Dougal, Executrix of Dr Dougal, against John Gordon, Nov. 17. 1795.*

INSURANCE. See PERICULUM.

J.

JURISDICTION. The Court of Session may controul corporations in the management of their funds.—Nature of such funds. No. 12. *John Macauland and others, against James Montgomery and Magistrates of Glasgow, Jan. 16. 1793.*

In questions of debt it is competent for a Commissary to decern for expences of

process and of extract, though thereby the sum contained in the decree should exceed L. 40 Scots. No. 33. *David Park against John Rutherford, Feb. 23. 1793.*

1. The application of a *curator bonis*, for the sanction of the Court to ordinary acts of administration, is incompetent.—2. Borrowing money found to be an extraordinary act of management. No. 46. *John Home, W. S. petitioner, March 7. 1793.*

Application for a warrant *meditatione fuge* against a person who has retired to the Abbey, must be made in the first instance to the bailie of that sanctuary. No. 48. *David Wight and others against Peter Niblie, March 9. 1793.*

25 Geo. III. c. 28.—The jury named by this statute are not competent to determine cases of consequential damage. No. 54. *Marquis of Abercorn against the Magistrates of Edinburgh, May 17. 1793.*

In what circumstances the Court of Session may review the proceedings of trustees acting under a turnpike-act, which allows an appeal from them to the next meeting of the quarter-sessions, whose judgments are declared to be *final and conclusive*. No. 55. *Countess of Loudon and others, against the Trustees on the High Roads in Ayrshire, May 28. 1793.*

Act 1693. c. 22.—It is competent to the Court of Session, and not to the superior church-courts, to review the sentences of presbyteries, in the exercise of their powers with regard to parochial schoolmasters. No. 74. *Michael Macculloch against William Allan, Nov. 26. 1793.*

Stat. 20. Geo. II. c. 43.—1. The burgh of barony of Greenock found to be dependent on the baron at the date of the jurisdiction act.—2. No deed of the baron, subsequent to the date of that statute, rendering a burgh independent of him, can revive its jurisdiction. No. 118. *Sheriff Clerk of Renfrewshire against the Magistrates and Town-Council of Greenock, Dec. 27. 1794.*

Have the Justices of Peace power to regulate the rates of hire for posting? No. 230. *William Scott, procurator-fiscal the county of Mid-Lothian, against Will Smith and others, chaise-hirers in Edinburgh, July 5. 1796.* See Abstract of Appeal Cases.

JUS SUPERVENIENS AUCTORI ACCRESCIT CESSORI. In heritable rights requiring sin, a supervening right arising to that of the author does not accrete to the cessor. No. 1. *William Keith against les Grant and others, Nov. 14. 1792.*

K.

KING. Under what seal should a patent for publishing a theatre in Scotland pass? No. 35. *Creditors of Jackson, and others, against Stephen Kemble, Feb. 26. 1793.*

The officers of the revenue suing

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due to the Crown, are preferable to the landlord, claiming on his hypothec over the *inveſta et illata*. No. 81. *The Factor on the ſequeſtrated eſtate of John Leſlie againſt James Tweedie*, Dec. 3. 1793.

KIRK. The area of a new church in a pariſh where there is both a royal burgh and a landward diſtrict, ſhould be divided between them in proportion to their population. No. 52. *John Ure and others againſt Patrick Carnegie and others*, May 16. 1793. See TACK.

L.

LEGACY. A legacy payable at the majority of the legatee lapses by his death before that period.—This found to hold even where the executors of the teſtator were empowered to pay it ſooner, if they ſhould think fit. No. 2. *Janet and Johanna Sempills againſt Hugh Lord Sempill*, Nov. 15. 1792.

LIFERENTER. A father, after diſpoſing his eſtate to his ſon, in his contract of marriage, reſerving to himſelf a liferent of one half of it, has no power to grant leases of the part liferented, to laſt beyond his own lifetime. No. 110. *Francis Fraſer againſt David Middleton*, Feb. 26. 1794.

LOCUS POENITENTIAE. A bargain concerning heritage, entered into by miſſives, found not to be binding, where one of the miſſives was improbable. No. 98. *James Barron againſt Sarah Roſe*, Jan. 23. 1794.

M.

MEMBER OF PARLIAMENT. An heir apparent may be enrolled, although his predecessor had only a baſe infeſtment, which has been made public by confirmation ſince his death. No. 14. *William Macdowall and George Houſtoun againſt James Hamilton*, Jan. 19. 1793.

It is a competent objection in a Court of Freeholders, that the ſeiſin of a claimant proceeds on an exhausted precept. No. 207. *James Lindſay Carnegie againſt George Robertſon Scott*, Feb. 26. 1796.

A meeting of freeholders who had rejected a claim preſented to them, found liable in the expence of ſerving a petition and complaint againſt their judgment, becauſe they had omitted to mark in their minutes one of their number as objector. No. 209. *William Govan againſt Sir George Douglas, and others*, Mar. 4. 1796.

A claimant having produced, before a Court of Freeholders, a diſpoſition from Commiſſioners, containing an aſſignation to a precept of ſeiſin in a Crown charter in favour of their conſtituent, and his claim having been rejected, becauſe he did not produce the commiſſion under which the diſpoſition was granted, it was found, that the objection might be removed by his afterwards producing it in the Court of Seſſion. No. 214. *Patrick Proctor againſt Sir David Carnegie*, May 14. 1796.

MULTIPLE-POINDING. See FORUM COMPETENS.

See PROCESS.

P.

PACTUM ILLICITUM. A merchant ſettled abroad, whether a foreigner or a native, who is acceſſory to ſmuggling goods into this country, has no action for the price of them, No. 49. *Attorney of Thomas Cullen and Company againſt David Philip*, May 15. 1793.

The ſame point. No. 50. *Reid and Parkinson againſt James Macdonald, John Elder, and others*, May 15. 1793.

An obligation granted by a miniſter not to bring a proceſs of augmentation in conſideration of a ſum of money received by him from the patron, is not binding. No. 97. *The Reverend Dr Boyd againſt the Earl of Galloway*, Jan. 22. 1794.

PART AND PERTINENT. See TACK.

PASSIVE TITLE. The facts proved in this caſe found to infer the paſſive title of vicious intromiſſion. No. 166. *Margaret Ritchie againſt Alexanders Bowes*, March 7. 1795.

Act 1695. c. 24.—An heir apparent does not incur a paſſive title by purchaſing a debt affecting the eſtate of his anceſtor, unleſs he poſſeſs the eſtate in conſequence of it. No. 221. *John Calland and his attorney againſt Donald Campbell*, June 10. 1796.

PATRONAGE. The ſix months within which patrons are bound to preſent, run from the date of the vacancy, and not from the period it comes to their knowledge; but if a preſentation is ſigned and diſpatched within ſix months from the vacancy, it will exclude the *jus devolutum* of the Preſbytery, although from circumſtances not imputable to the patron, it ſhould not be lodged with the Moderator for a ſhort time after their expiration. No. 170. *Lord Dundas and Mr John Nicolſon againſt the Preſbytery of Zetland, and Mr Archibald Gray*, May 15. 1795.

PENAL STATUTE, 26. Geo. III. c. 51. Strict interpretation of penal ſtatutes. App. No. 1. *His Maſteſty's Advocate againſt Alexander Brown and John Macnab*, Mar. 18. and Dec. 23. 1793.

PENALTY. A decree *in foro*, "in terms of the libel," upon a bond containing a penalty, does not include expences of proceſs. No. 218. *Mrs Janet Young and huſband againſt Mrs Janet Sinclair and others*, May 21. 1796.

PERICULUM. It is illegal to inſure that a whale-ſhip will return with a certain quantity of blubber. No. 41. *Charles Addiſon and Sons againſt William Duguid and others*, March 1. 1793.

The clause in a policy "with leave to call at a port," does not juſtify an alteration of the voyage. No. 65. *Archibald*
c and

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James Robertson and Company, against John Laird, June 25. 1793.

A vessel, which strikes on a rock, and is not off again without being much damaged, is not held to be stranded. No. 93. *James Craig and William Hislop against John Spence and others, Jan. 16. 1794.*

Loss arising from grain having been accidentally pumped out along with water from a leaky vessel, not held to be a general average. *Ibid.*

A farmer found not entitled to deduct any part of the wages of a servant hired for a year, on account of his having been disabled by sickness from working during eleven weeks of that period. No. 135. *David White against David Baillie, Nov. 29. 1794.*

A mercantile Company in Scotland, sold grain for a merchant in London, on a commission *del credere*, and took bills for the price, which, before they became due, they discounted with a private banking house in Edinburgh, then in good credit, who drew a bill on London for their amount, payable to the order of the Scotch Company, who indorsed and transmitted it to their employer: The drawers and accepters of this bill having become bankrupt, before the term of payment, the Scotch Company were found liable for it. No. 149. *Claude Scott against Mackenzie and Lindsay, Jan. 15. 1795.* See Abstract of Appeal Cases.

An underwriter having become bankrupt while certain risks were in dependence, the premiums for which had not been then paid by the insured; and the broker, at whose office these risks had been undertaken, having, of his own accord, reassured them for behoof of all concerned, at a lower rate than that originally stipulated, he was found entitled, in accounting with the creditors of the original underwriter, to set off the second premiums in compensation of the first, payment of which he had by that time received from the insured, and to be debtor to the creditors only for the balance. No. 181. *William Keith, Trustee for the Creditors of Thomas Anderson, against James Thomson and Son, July 3. 1795.*

A factor in Scotland, employed to sell goods belonging to English merchants, was accustomed to lodge the price in a private banking-house, on an account in his own name, and to take from them bills drawn on their correspondent in London, payable to himself, which he indorsed, and transmitted to his employers, against whom he charged $2\frac{1}{2}$ per cent. commission. Upon the bankruptcy of the drawers and accepters, he was found liable for such bills as had not been paid by them. No. 187. *Richard Baines against Thomas Turnbull, Dec. 1. 1795.*

PERSONAL AND REAL. See TACK.

PERSONAL AND TRANSMISSIBLE. Effect of an entailor's appointing the succeeding heirs to carry the arms of his family, where none

such are matriculated in the Lyon-Office. No. 101. *Dr Robert Moir against Dr Charles Alexander Graham and others, Feb. 5. 1794.*

PLANTING AND INCLOSING. A& 1686. c. 11. "For winter-berding."—The statute applies where damage is done to corns, as well as where it is done to grass or planting. No. 105. *Alexander Govan against Thomas Lang, Feb. 18. 1794.*

Can the penalties be exacted, where the cattle trespassing are herded. *Ibid.*

Is it necessary to detain the cattle trespassing, in order to entitle to the penalties? *Ibid.*

POSSESSORY JUDGMENT. *Prima facie* evidence of right to an exclusive privilege, held sufficient to authorise an interdict *retinenda possessionis*. No. 35. *Creditors of Jackson and Mrs Estlin, against Stephen Kemble, Feb. 26. 1793.*

POOR. Proprietors of mills, and of coal and salt works, are liable to be assessed for the maintenance of the poor. No. 120. *The Collector of the poor's rates in the parish of Inveresk, against the Magistrates of Musselburgh and Sir Archibald Hope, May 28. 1794.*

It is competent for the Magistrates of Glasgow to levy the poor's rates upon the inhabitants, according to the extent of their heritable property within the town, and of their personal property wherever situated. Appendix. *Thomas Laurie, Collector of the poor's rates for the city of Glasgow, against Robert Dregborn, Dec. 2. 1797.*

PRESCRIPTION. 1695, c. 5. A person expressly bound as cautioner, has the benefit of this statute, though the bond should not contain a clause of relief, and though there should be no separate bond of relief intimated to the creditor at receiving the bond. No. 5. *Douglas, Heron and Company, against William Riddick, Nov. 20. 1792.*

Septennial prescription introduced by act 1695, c. 5. barred by a decree in absence.—Cautioner in that case liable only for the principal sum and interest falling due within seven years from the date of the bond.—Decree in absence not considered as a *novatio debiti*.—A cautioner found to be barred *personalis exceptione* from pleading the benefit of the statute, when delay had been solicited by his factor. No. 40. *Douglas, Heron and Company, against William Riddick, March 1. 1793.*

1617, c. 13. Does the vicennial prescription apply where the lawful heir has been irregularly served? No. 53. *Francis Pinkerton Drummond, against William Abernethy Drummond, Mary Ogilvie, and her husband, May 7. 1793.* See Abstract of Appeal Cases.

1695, c. 5. The cautioner in a bond of relief is not entitled to its benefit. No. *Alexander Bruce against the Representatives of John Stein, June 26. 1793.*

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The sexennial prescription of bills runs from the last day of grace, and not from the day of payment. No. 72. *Douglas, Heron and Company, against the Trustees of Andrew Grant*, Nov. 19. 1793. See Abstract of Appeal Cases.

Act 1579, c. 83. An account of furnishings, although instructed by a commission in writing from the purchaser, and by the carrier's receipt for them, falls under the triennial prescription. No. 130. *William Douglas against Mary Grierison*, Nov. 18. 1794.

1579, c. 83. An action founded upon a mandate is not affected by the triennial prescription. No. 131. *Francis Saddler and his attorney, against Murdoch Mackan*, Nov. 18. 1794.

1579, c. 83. Action for the price of goods consigned by one foreign merchant to another, is not cut off by the triennial prescription. No. 150. *John Hamilton and Company, against John Martin*, Jan. 24. 1795.

Act 1772, c. 72. § 37. A decree of constitution, obtained by a debtor in a bill, within six years from its date, against a person bound to relieve him, found not to interrupt the sexennial prescription in favour of the creditor in the bill, although he had been examined on the verity of his debt in the process of constitution, and had on that occasion produced his bill. No. 164. *Viscount Arbutnot against John Douglas*, March 3. 1795.

The effect of a latent transaction, of an old date, relieving the vassal from payment of the feu-duty, found not to be lost by prescription, although the feu-duty appeared in all the investitures, there being no evidence of its ever having been paid. No. 199. *The Earl of Cassillis against the common agent for the Creditors of Hugh Ross*, Feb. 3. 1796.

See PUBLIC BURDEN.

PRESUMPTION. The presumption, that the fees of physicians are instantly paid, does not hold, where it is not the practice of the place to pay them immediately, and where the physician supplies the patient with medicines, an account for which is due at his death. No. 178. *Dr James Flint against the Trustees of David Alexander*, June 17. 1795.

A bond of provision by a father to his daughter, found in the repositories of her grand-uncle by the father's fide, presumed to have been held for behoof of the father. No. 220. *John Zephaniab Holwell and his attorney, against Lady Cuming*, May 31. 1796.

See BILL OF EXCHANGE.

See TAILZIE.

PRISONER. Act of sederunt, 11th February 1671. When a prisoner on a warrant *meditatione fugæ*, escapes through the insufficiency of the prison, or negligence of the jailor, the Magistrates of the burgh are not liable for the debt, but they are considered as cautioners *judicio fisci*; and if the pri-

soner is recommitted before they are required to present him in Court, no claim lies against them. No. 4. *Colin Brown against the Magistrates of Lanark*, Nov. 16. 1792.

A person found entitled to the benefit of a *Cessio bonorum*, who was imprisoned by the sentence of a judge till payment of a fine to a private party. No. 191. *William Law against Daniel Dewar and William Sprott*, Dec. 12. 1795.

PROCESS. The decree of an inferior court, although fundamentally null, may be turned into a libel. No. 59. *John Herbertson and Company, against James Rattray and others*, June 12. 1793.

The Court can dispense with the second diet in a summons of constitution on the passive titles, where the pursuer restricts his demand to a decree *cognitionis causa*. No. 133. *Horatius Cannan, common Agent in the Ranking of Polquhairs, against John Greig, Trustee for Alexander Crawfurd*, Nov. 26. 1794.

The Court may allow a decree, *cognitionis causa*, to be extracted before it is read in the minute-book. No. 160. *The Common Agent in the Ranking of Polquhairs, against Andrew Corrie*, Feb. 24. 1795.

A declarator of non-entry, raised against the heir of the vassal last infeft, may, upon the death of the defender, before decree, be transferred against the succeeding heir. No. 175. *The Earl of Dumfries against Douglas John Campbell*, June 13. 1795.

Where a summons of constitution and arrestment on it have been produced as an interest in a multiple-poining, and an interlocutor has been pronounced, preferring the claimant, within year and day from the execution of the summons, it is not necessary that the summons should be called in Court. No. 177. *Mansfield, Ramsay and Company, and Baillie, Pocock and Company, against Smith, Wright and Gray*, June 17. 1795.

PROOF. It is competent to prove by facts and circumstances, that one of two joint obligants in a bond is only cautioner for the other, so as to entitle him to a total relief out of the bankrupt estate of the co-obligant. No. 32. *Alexander Smollet, against Bell and Rannie, and others*, Feb. 21. 1793.

A proof of the *veritas convicii* limited to specific circumstances. No. 45. *Samuel Peat against the Reverend Dr John Smith*, March 6. 1793.

A verdict of acquittal in the Court of Justiciary does not preclude a proof of the same facts, and by the same witnesses, in a civil action. No. 85. *John Ker, and the Trustee for his Creditors, against the Agent for the Sun Fire-Office*, Dec. 17. 1793.

A holograph letter discovered in a gentleman's repositories at his death, in which he declared himself the husband of his housekeeper,

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housekeeper, who had long cohabited with and born children to him, found not to be sufficient evidence of marriage. No. 183. *Jean Anderson and her Children against John Fullerton and others*, Nov. 13. 1795.

How far does the holograph acknowledgment of the intimation of an assignation prove its own date? No. 184. *Mrs Jane Ann Macdougall, executrix of Dr Dougall, against John Gordon*, Nov. 17. 1795.

If a title, by adjudication upon a trust-bond, be objected to upon the ground of bastardy, the pursuer must prove his legitimacy. No. 205. *Geddes and Clarke against Jean Bull*, Feb. 25. 1796.

See ARBITRATION.

See CONSIGNATION.

See WITNESS.

PROPERTY. When a private river separates the lands of two heritors, neither can take a cut from it for the purpose of establishing any species of manufacture, without the consent of the other. No. 43. *John Hamilton against Thomas Edington and Company*, March 5. 1793.

See SALMON, FISHING.

PROVISION TO HEIRS AND CHILDREN. A destination of lands in a marriage-contract, "to heirs or children, one or more," how to be interpreted? No. 7. *Jane Dollar and her Husband, against John Dollar*, Dec. 4. 1792.

Where a wife in a postnuptial contract of marriage disposes lands to her husband in life, and to the heirs of the marriage in fee, but with power to the father to sell, or burden them upon condition of his granting security for a certain provision payable at his death to the heir; such provision is good in competition with the onerous creditors of the father. No. 133. *Horatius Cannan, common Agent in the Ranking of Polquhairs, against John Greig, Trustee for Alexander Crawford*, Nov. 26. 1794.

See IMPLIED CONDITION.

PUBLIC BURDEN. When a proprietor sells a part of his lands, his right to be relieved from payment of a proportional part of the public burdens, cannot be lost by the negative prescription. No. 102. *John Mill against George Skene*, Feb. 7. 1794.

Manufacturers and mechanics in a burgh of barony are liable for a proportion of the cess paid by it for the communication of the privilege of foreign trade. No. 119. *James Kell and others, against the Stent-Masters and Collector of the Cess in the Burgh of Saltcoats*, May 27. 1794.

The householders in a country village are indiscriminately liable to the burden of having soldiers billeted upon them. No. 121. *Hugh Crawford and others, against John Wilson and others*, June 3. 1794.

All the inhabitants of a royal burgh are indiscriminately liable to have soldiers bil-

litted upon them, except schoolmasters, unmarried women and paupers. No. 219. *John Aitchison and others, against the Magistrates and Billet-Master of Haddington*, May 31. 1796.

PUBLIC OFFICER. Favourable situation of a public officer, acting *bona fide* in the discharge of his duty. No. 23. *James Henderson against William Scott*, Feb. 7. 1793.

The right of appointing the keeper of the general register of feifins belongs to the Crown, and not to the Lord Clerk-Register. —The Lord Clerk-Register has the right of marking the books of the general register, and of all the particular registers of feifins, and is also entitled to the ultimate custody of them. No. 165. *Lord Frederick Campbell, Lord Clerk-Register of Scotland, against Andrew Stewart, keeper of the general and particular register of feifins at Edinburgh*, March 3. 1795.

PUBLIC POLICE. No length of possession can authorise any obstruction to the navigation of a public river. No. 87. *Sir James Colquhoun, against the Duke of Montrose and others, and the Magistrates of Dumbarton*, Dec. 21. 1793.

PUBLISHER. Responsible for what he publishes. App. No. 2. *His Majesty's Advocate against James Robertson and Walter Berry*, March 18. 1793.

Q.

QUOD POTUIT NON FECIT. See TESTAMENT.

R.

RANKING AND SALE. The common agent in a ranking is not disqualified from purchasing at the judicial sale carried on under his direction. No. 47. *The York-building Company against Alexander Mackenzie*, March 8. 1793. See Abstract of Appeal cases.

When a creditor on an estate brought to judicial sale, obtains partial payments to account of his debt, in virtue of an interim warrant on the purchaser, and afterwards claims for the remainder of it upon the general fund under division, he is not entitled, in a question with the creditors, to impute the payments he has received, periodically towards extinction of the interest which may have grown on his debt since he obtained the warrant, but must turn them into a corresponding capital, as at the period when the price began to bear interest. No. 155. *The Trustee of David Dickson against the Creditors of John Rae*, Feb. 4. 1795.

Is a creditor in a judicial sale, who obtains an interim warrant, entitled to the expense of extracting it out of the common fund? *ibid.*

A decree of certification does not bar a creditor from obtaining a preference, upon an adjudication afterwards led, on grounds of

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of debt produced before the decree was pronounced. No. 217. *The Representatives of John Dunn against Peter Johnston and others*, May 19. 1796.

See COMPETITION.

RECOMPENSE. A person holding an heritable subject in trust, and having a right of retention over it for debts owing to him by the proprietor, is not liable for the claims of tradesmen, for meliorations made upon it by desire of the latter. No. 173. *The Heirs of Robert Selby, &c. against James Follie*, June 5. 1795.

REDEMPTION. A reverser about to redeem a wadset, must premonish those who hold subaltern infeftments granted by the wadsetter. No. 109. *Younger Children of Neil Macneil against the Representatives of Sir Archibald Campbell and others*, Feb. 25. 1794.

REMOVING. Act of federunt, 14th December 1756.—The obligation of the cautioners in the suspension is limited to what is decreed for by the Sheriff. Does the act apply to illiquid prestations? No. 37. *The Earl and Countess of Morton against the Representatives of Daniel Murray and others*, Feb. 26. 1793.

1555. c. 39. Found sufficient that the precept of warning was affixed to the door of the church-yard. No. 42. *Donald Campbell against John Johnston*, March 1. 1793.

The precept is valid, although the tenant is warned to remove at the separation of the crop from the ground, instead of Martinmas, *ibid.*

The heirs of a tenant for life may be removed summarily between terms. No. 146. *Mr Baron Gordon against the Representatives of Robert Michie*, Dec. 13. 1794.

Same point. No. 225. *George Stewart against the Representatives of Patrick Grimmond*, June 24. 1796.

It is sufficient for the tenant of a house in Edinburgh to intimate to the landlord his intention of removing forty days before Whitsunday. No. 180. *Alexander Jack against the Earl of Kellie*, June 20. 1795.

The act of federunt 1756, § 5. does not apply unless the tenant be a full year's rent in arrear at the date of the decree; but the landlord is not obliged to accept of partial payments. No. 229. *John Low against Andrew Knowles*, July 5. 1796.

RES JUDICATA. See PROOF.

RIGHT IN SECURITY. An indefinite security cannot be created on an heritable bond. No. 22. *Creditors of James Stein against Newenham, Everett and Co.* Feb. 1. 1793. See Abstract of Appeal Cases.

An heritable security in relief granted to a cautioner in a cash-account, found not to cover sums drawn out at the date of the infeftment, where, in consequence of future operations by the principal debtor, these sums were repaid, and another balance afterwards created, which the cau-

tioner paid, the principal debtor having become insolvent. No. 145. *The Trustees for the Creditors of John Brough against the Heirs of Robert Selby*, Dec. 12. 1794.

RUN-RIDGE. 1695, c. 23.—A decree of the Sheriff giving off nine contiguous acres, supported. No. 36. *Sir William Jardine, against Lady Douglas, Francis Sharp, and others*, Feb. 26. 1793.

S.

SALE. A wholesale dealer in spirits, who had agreed to supply a retailer for a year, at a certain price, found liable in damages for refusing to fulfil his agreement, although the market-price of spirits had risen considerably, in consequence of a tax imposed during the currency of the year. No. 151. *John Maclelland against Adam and Mathie*, Jan. 27. 1795.

SALMON FISHING. The act 1581, c. 111. is not now in force. No. 73. *The Procurator-fiscal of the town of Stirling against John Gillies and others*, Nov. 20. 1793.

A right of salmon fishing cannot be exercised by means of nets extending across the river, and supported by stakes stuck into its channel. No. 87. *Sir James Colquhoun against the Duke of Montrose and others, and the Magistrates of Dumbarton*, Dec. 21. 1793.

When a person has a grant of salmon fishing in a river, which, at the date of the grant, ran into the sea, opposite to his own lands, upon its afterwards changing its course, and discharging itself into the sea opposite to the property of his neighbour, who has a right to the sea-fishing there, the former continues to have an exclusive right to the fishing in the river, so far as it is distinguishable from the sea. No. 222. *James Brodie against the Magistrates and Town-Council of Nairn, the Earl of Findlater, and David Davidson*, June 14. 1796.

SEISIN. An infeftment taken in favour of the heirs of a person deceased, without naming or designing them, is ineffectual. No. 103. *John Melvill against the Creditors of George Smiton*, Feb. 14. 1794.

An instrument of seisin signed by the notary once on every leaf is good, although he should have omitted to subscribe some of its pages. No. 207. *James Lindsay against George Robertson Scott*, Feb. 26. 1796.

SEQUESTRATION. See HEIR APPARENT.

SERVITUDE. The extent of a predial servitude is to be regulated by the proper uses of the dominant tenement. No. 76. *Alexander Leslie against Robert Cumming*, Nov. 27. 1793.

SOCIETY. The creditors of a solvent company can rank on the sequestrated estate of one of the partners, who happens to be debtor to the company, only to the extent of the balance due by him to the company, and not for the amount of the debts due to themselves.

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themselves. No. 195. *John Dunlop, Trustee on the sequestrated estate of James Dunlop, against the Dunbarton Glaswork Company, and their creditors, Jan. 15. 1796.*

The creditors of an insolvent company are entitled to rank on the private estates of the partners *pari passu* with their private creditors. No. 216. *Charles Campbell, Trustee for the Creditors of Thomas Houston and others, against Francis Blaikie, Trustee for the Creditors of Ramsay, Smith, Graham and Company, May 19. 1796.*

SOLIDUM ET PRO RATA. A tutor named by a grandfather, who neglects to make up inventories, is liable *in solidum*, although appointed by the same deed trustee over the pupil's estate. No. 18. *Marion Kilpatrick against John Macalpine, Jan. 25. 1793.*

See CAUTIONER.

SUCCESSION. A general disponent, not the heir at law, has right to the after acquisitions of the disponent, though the rights to them have been taken in favour of heirs and assignees. No. 106. *George Robson against James Robson, Feb. 18. 1794.*

The succession of a Scotsman who had resided many years in the West Indies, where he had acquired a valuable plantation, but who had returned to his native country for the recovery of his health, and died there, found to be regulated by the law of Scotland, although a proof was offered that he meant to have returned to the West Indies if his health had permitted. No. 133. *Jean Macdonald against Alexander Laing, Nov. 27. 1794.*

SUMMARY APPLICATION. When a magistrate illegally refuses to imprison a debtor, or detains money consigned in his hands, redress may be obtained by a summary petition and complaint. No. 83. *James and William Duff against Laurence Sutherland, Dec. 7. 1793.*

A summary petition by a tutor, for authority to let an heritable subject belonging to his pupil for a period longer than the duration of his office, found to be incompetent. No. 111. *James Hallows, petitioner, March 1. 1794.*

SUPERIOR AND VASSAL. The superior is not obliged to relieve the vassal from any share of parochial burdens. No. 107. *John Murray against James Scott, Feb. 20. 1794.*

A singular successor found liable in a year's rent for his entry, although by the original charter, conveying the lands to heirs and assignees, it was provided, that so often as the lands shall fall into the hands of the superior, "by reason of liferent," "escheat, non-entry, or otherwise for whatsomever occasion," they were of new to be made over to the vassal and "his forefairs," on payment of two shillings Scots money. No. 123. *Thomas Brifbane against Lord Sempill, June 6. 1794.*

A superior is not entitled to infeft the vassal in a feu-right, without his consent, nor

to infeft that the infeftment shall be expedited by his own man of business. No. 129. *David Stewart against James Burnside, Nov. 12. 1794.*

A superior having refused to grant a charter on an entail, unless it contained a clause acknowledging his right to a year's rent, whenever the substitute taking up the estate should not be heir-male or of line to the vassal last entered, the Court found him only entitled to have a reservation inserted in it, keeping the question open for discussion when the case should occur. App. *The Duke of Argyle against the Earl of Dunmore, Nov. 19. 1795.*

See BASE INFEFTMENT.

See PRESCRIPTION.

SUSPENSION. When a cautioner in a suspension becomes bankrupt during its dependence, the charger cannot infeft for new security. No. 147. *Alexander Govan against John Gray, Dec. 13. 1794.*

T.

TACK. A power of subsetting is implied in a lease of land for thirty-eight years. No. 117. *William Simpson against David Gray and John Webster, May 22. 1794.*

A lease of an urban tenement is effectual against singular successors. No. 142. *James Waddel against John Brown, Dec. 10. 1794.*

A tenant found not entitled to cut seaweed for the manufacture of kelp, although the lease gave him the lands, with "parts," "pendicles, and universal pertinents thereof, used and wont;" and although a proof was offered, that he and the former tenant had been accustomed to do so. No. 171. *Archibald Campbell against Colin Campbell, June 2. 1795.*

Suitable accommodation in that part of the area of the parish-church which belongs to the landlord, is held to be included in a lease of lands. No. 224. *Robert Skirving and George Young, against Robert Vernor, June 21. 1796.*

A tenant is not entitled to dispose of any part of the fodder raised on his farm, except his hay, and the straw of his outgoing crop. No. 227. *Mark Pringle against Major George Lewis Macmurdo, June 30. 1796.*

Where a lease is granted to assignees, how far is the original tenant liable to the landlord for the rent after assignation? No. 229. *John Low against Andrew Knowles, July 5. 1796.*

See ASSIGNATION.

TAILZIE. 10th Geo. III. chap. 51. Trustees of the proprietor of an entailed estate found entitled to claim from the succeeding heir, three fourths of the sums expended in improving it, though he had taken grassums, and had not raised the old rent. No. 16. *The Trustees of Sir Francis Elliott against Sir William Elliot, Jan. 22. 1793.*

Whether

I N D E X.

Whether the notice given to the succeeding heir of entail must specify every particular of the plan of improvement intended. *Ibid.*

A clause in an entail, prohibiting the heirs called to the succession from raising the rents beyond a certain amount, found to be revoked, by the entailor's increasing them in his own lifetime above the sum specified. No. 101. *Dr Robert Moir against Dr Charles Alexander Graham and others* Feb. 5. 1794.

See HEIR-APPARENT.

See HUSBAND AND WIFE.

See TERCE.

TEINDS. When a joint feu-duty is payable for stock and teind, the portion paid for the latter is free teind. No. 27. *Sir Thomas Dundas against Robert Baikie and others*, Feb. 13. 1793.

In a valuation of teinds, where the value of lands in the natural possession of the proprietor has been ascertained in money by the evidence of the witnesses adduced, the titular cannot afterward insist that any part of the teind shall be converted into grain.—A titular has no right to infestment in the lands in security of the valued teind. No. 28. *John Scott and others against the College of Glasgow*, Feb. 27. 1793.

When the teinds are valued in money, an augmentation cannot be modified in grain. No. 39. *John Gordon against the Earl of Fife and others*, Feb. 27. 1793.

An heritor may pursue a sale of his teinds, although the have been valued more than two years before. No. 115. *Sir Alexander Ramsay Irvine against the Honorable William Maule*, May 14. 1794.

When an heritor brings a sale of his teinds, already valued in victual, the grain is converted at the medium of the fair prices of the county, for seven years preceding. *Ibid.*

A report of the sub-commissioners approved of, where the value of the lands was ascertained without a proof, by consent of the heritor, patron, and minister; but rejected when it proceeded on consent of the two former only. No. 156. *William Ferguson against John Gillespie*, Feb. 4. 1795. See Abstract of Appeal Cases.

A valuation in grain is not held to be derelinqished by payments to the minister in money, of an equal value. *Ibid.*

When a titular or patron brings an action, in order to have his right to teinds ascertained, and claims arrears for forty years back, a colourable title of possession is sufficient to defend the heritors against payment of those which became due prior to the decree in the process of declarator. No. 162. *Sir John Scott against the Heritors of the parish of Ancrum*, Feb. 25. 1795.

When an estate is let to a general lessee at an undervalue, the rent paid by the te-

nants to him, and not that paid by him to the landlord, is to be taken as the rule in a process of valuation. No. 162. *John Leslie against the Earl of Kintore and others*, Feb. 25. 1795.

Teinds vested in the Crown, in right of the Bishops, cannot be allocated in payment of stipend, till those heritably possessed by the proprietors of the lands are exhausted. No. 172. *Andrew Skene and John Elmslie, against the Officers of State and others*, June 3. 1795.

Teinds belonging to a college are not liable for stipend till those heritably disposed to the proprietors of the lands are exhausted. No. 190. *The Heritors of Portmoak against Mrs Anne Jean Douglas*, Dec. 9. 1795.

Where part of the lands in a parish are sublet, the rent paid by the principal lessee, and not that which he receives from the subtenant, is adopted as the rule for ascertaining the burden to be imposed on them in a process of augmentation and locality. No. 193. *Earl of Caithness against James Finlay, common Agent for carrying on the locality of the stipend of the parish of Dalrymple*, Dec. 16. 1795.

A minister who is titular of the vicarage-teinds of certain lands in his parish, and of which his predecessors had granted successive leases to the heritor for upwards of a century, is not entitled, on the expiry of the current lease, to claim the tithe of all the articles from which vicarage is usually payable, but must either accept the rent and grassum as its value, or bring evidence of the particular subjects from which vicarage-teinds were drawn before the first lease was granted. No. 211. *The Rev. John Hunter against the Duke of Roxburgh*, March 9. 1796.

The right of the minister to the vicarage-tithes of bog-hay will not entitle him to claim the tithe of hay from sown grass, although bog-hay should no longer grow in the parish. No. 223. *The Rev. David Brown against Walter Hunter*, June 15. 1796.

TERCE. The terce may be excluded by an express clause in an entail, even although it should not contain irritant or resolute clauses. No. 186. *Mrs Jean Gibson against Christian Kerr Reid*, Nov. 24. 1795.

Where there are two mansion-houses on an estate, has the widow a right to the second as an appendage of her terce? No. 204. *Dame Mary Mead against Archibald Swinton, common Agent for the Creditors of Sir Samuel Hannay*, Feb. 24. 1796.

TERM LEGAL AND CONVENTIONAL. In grass farms, when the landlord survives Whitsunday, his executor draws a half of the rent payable at Martinmas and Whitsunday thereafter. No. 6. *The Trustees of Sir Francis Elliott against Sir William Elliott*, Nov. 28. 1792.

TESTAMENT.

I N D E X.

TESTAMENT. Dispositive words are necessary, in order to convey heritage. No. 84. *Sir John Ogilvie and others, against Catherine Mercer and others, Dec. 10. 1793.* See Abstract of Appeal Cases.

Heritable property cannot be conveyed by a testament executed in England, although it would there have been effectual for that purpose. No. 174. *John Henderson, acting Trustee and Executor of William Crichton and others, against Charles Selkirk, Trustee for the Creditors of Alexander Crichton, June 10. 1795.*

Heritable property in Scotland cannot be conveyed by a testament executed in England and in the English form. No. 189. *The Creditors of William Robertson against the Disponees of Janet Mason, Dec. 9. 1795.*

THIRLAGE. When lands are exchanged in terms of the act 1695, c. 23, the servitude of thirlage is transferred, though the proprietor of the mill be not a party in the action of division. No. 36. *Sir William Jardine against Lady Douglas, Francis Sharp and others, Feb. 26. 1793.*

TITLE TO PURSUE. A general service as heir of line is not a sufficient title to pursue in a reduction of a right to lands on which infestment has followed, where the pursuer, if successful, must take them up as heir of provision. No. 31. *Neil Maccallum against James Campbell, Feb. 21. 1793.*

25 Geo. II. c. 9. An action of declarator and damages against the Magistrates of Edinburgh, sustained at the instance of certain brewers, complaining of inequality in levying the duty of two pennies Scots on the pint of ale and beer. No. 90. *Matthew Comb and others against the Magistrates of Edinburgh, Jan. 16. 1794.*

The trustee for the creditors of a bankrupt is not entitled to bring a charge of fraudulent bankruptcy against him without the concurrence of his Majesty's Advocate. No. 202. *Hew Darby against James Love, Feb. 10. 1796.*

The crime of attempting to suborn witnesses to commit perjury, cannot be prosecuted at the instance of the party who would have been hurt, had the attempt been carried into effect. Append. No. 3. *Sir William Jardine, with concurrence of his Majesty's Advocate, against Magdalene Barbarie de la Motte, June 15. 1795.*

See COMPETITION.

See PROOF.

TRUST. The trustees in a family-settlement may pay to the creditor *primo venienti*, till interpellated by legal diligence, and need not bring a multiple-poinning. No. 17. *Alexander Alison against the Trustees of the Earl of Dundonald, Jan. 22. 1793.*

See ARRESTMENT.

TUTOR AND PUPIL. When a father is in embarrassed circumstances, and not resi-

dent in Scotland, persons indebted to his children cannot safely make payment to him as their administrator-in-law, without security that it shall be applied for their behoof. No. 108. — *Grabam against Duff, Feb. 22. 1794.*

See ARBITRATION.

See SOLIDUM ET PRO RATA.

V.

VERDICT. A punishment inflicted where the pannels were charged with wickedly and feloniously printing and publishing a seditious pamphlet; and the Jury found, "that one of the pannels had printed and published, and that the other had published only, the pamphlet libelled on." App. No. 11. *His Majesty's Advocate against James Robertson and Walter Berry, March 18. 1793.*

W.

WITNESS. Objection to a witness that he is a party in the process, as attorney for the pursuer, found to be removed by his obtaining a bond relieving him from the consequences of the action. No. 26. *John Sims and his attorneys, against the Children of George Simpson, Feb. 9. 1793.*

Objection that witnesses were precognosced before a Justice of the Peace at the instance of the pursuer in a civil action, repelled. No. 34. *James Wemyss and others against William Wemyss, Feb. 26. 1793.*

It is not a relevant objection to a witness in a civil action of damages, that he has been formerly examined in a precognition taken by the public prosecutor, even although his declaration should have been lodged in the process at the instance of the private party. The presence of a witness in an official capacity, while others are precognosced, is no bar to his admissibility. No. 58. *Thomas Anderson against John Sproat June 7. 1793.*

A witness is not entitled to charge more for his travelling-expences, than what is allowed by the act of sederunt, 21st December 1765. No. 137. *William Gordon against John and Hugh Macfarlanes, Dec. 3. 1794.*

See PROOF.

WRIT. 1681, c. 5. Instrumentary witnesses may be examined as to the facts of their having seen the granter subscribe, or heard him acknowledge his subscription. No. 70. *William-Daniel-Arthur, Frank against James Frank and others, July 9. 1793.*

An informal missive, importing a cautionary-obligation, found effectual, where the subscription was acknowledged by the granter, and the other party had acted on the faith of it. No. 134. *George Brown against Alexander Campbell, Nov. 28. 1794.*

In the case of a deed executed by a person who can neither read nor write, it is not

I N D E X.

not necessary as a statutable solemnity, that the doquet of the notaries should bear, that it was read to the granter in presence of the witnesses. No. 136. *James Yorkstoun and others, against Mary Grieve, Dec. 2. 1794.*

An execution of poinding, consisting of more sheets than one, sustained, although one page of it, which contained nothing material, was not signed by the messenger, and another nor signed by the appraisers. No. 159. *David Peter against Thomas Ross and others, Feb. 19. 1795.*

1681, c. 5. A deed, *ex facie* regularly executed, sustained, although one of the instrumentary witnesses, when examined *ex intervallo*, deponed, that he did not see the

granter subscribe, nor hear him acknowledge his subscription. No 163. *William-Daniel-Arthur Frank, and his Tutor ad litem, against James Frank and others, Mar. 3. 1795.*

It is not essential, in point of solemnity, that the witnesses should subscribe *in presence* of the granter, or that the deed should never be out of their sight, in the interval betwixt his and their subscriptions. *Ibid.*

WRONGOUS IMPRISONMENT. Act 1701, c. 6.

A person in suspicious circumstances may be imprisoned, though no information has been lodged that the crime of which he is suspected has been committed. No. 23. *James Henderson against William Scott, Feb. 7. 1793.*

Since the Abstract of APPEAL CASES was thrown off, the Reporters have received the following Card from Mr PEAT, Agent for one of the Parties in the Case of Newlands against the Creditors of Newlands, 9th July 1794, No. 128.

Mr Peat's compliments to Mr Davidson, and hands him a copy of the judgment of the House of Peers, in the case of Newlands, which he only received this morning.

Mr Chalmer*, in a letter received by yesterday's post, mentions, 'That the Lord Chancellor "is anxious that it should be understood, that he does not mean this decision as settling the point." And I have promised him that you will speak to the Collectors of Decisions, who, I presume, will have no difficulty of mentioning, generally, what he said, when they come to state the result of the Appeals in cases decided. It will be obliging if you mention that you have done this, and what the Collectors say that I may report to the Chancellor.' Mr Peat sends an accurate copy of the Heads of his Lordship's Speech on that occasion †; and Mr Peat presumes he may desire Mr Chalmer to acquaint his Lordship, that proper notice will be taken of it in collecting the case.

* Solicitor in London.

† The notes of the Lord Chancellor's speech referred to by Mr Peat, are bound up with the printed papers relative to this volume, lodged in the Advocates Library.

PARLIAMENT-SQUARE, }
Monday, May 28. 1798. }

E R R A T A.

Page 127. In No. 158, read *Thomas Anderson* for *John Sproat*, and *vice versa* throughout the Report.

— 229. Add D. D. to No. 103.

— 237. Add D. D. to No. 106.



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THE
OFFICE OF THE
ATTORNEY GENERAL
STATE OF NEW YORK
ALBANY
JANUARY 10, 1901

TO THE
COMMISSIONERS OF THE
LAND OFFICE
ALBANY

SIR:

I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the above matter.

I am, Sir, very respectfully,
Yours very truly,
J. B. ALLEN,
Attorney General.

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